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IN THE

Supreme Court of the United States

PEARL COTTIER;
REBECCA THREE STARS,

Petitioners,

—v.—

CITY OF MARTIN; et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the district court's original finding that the plaintiffs had *not* established one of the threshold factors for a finding of vote dilution under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, properly before the Eighth Circuit upon review of a superseding final judgment in the plaintiffs' favor after remand from a prior panel?

2. Is statistical evidence necessary to prove legally significant racially polarized voting under *Thornburg v. Gingles*, 478 U.S. 30 (1986)?

3. Do minority voters have an equal opportunity to elect aldermen and alderwomen of their choice when the evidence shows that minority voters have had some success in electing their preferred candidates—but only in nonmunicipal elections, when "minority" voters constitute a majority of the electorate, or when their preferred candidates are white?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption except for the mayor, finance officer, and city council members of the City of Martin, each of whom was sued in his or her official capacity. The current mayor is Toni L. Ruff. The current finance officer is Leah Waltman. The current aldermen and alderwomen are David L. Bakley, Gregg A. Claussen, Charles J. Gotheridge, Shirley J. McCue, Cecelia Moffett, and Sherry J. Peck. They were automatically substituted as parties following the municipal election that took place in June 2010.

None of the parties is a nongovernmental corporation to which the disclosure requirements of Rule 29.6 apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pearl Cottier and Rebecca Three Stars respectfully request that a writ of certiorari issue to review the judgment of the en banc United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 155-96) in *Cottier II* is reported at 604 F.3d 553. The district court's opinion (App. 109-54) following remand in *Cottier I* is reported at 466 F. Supp. 2d 1175. The panel opinion in *Cottier I* (App. 82-108) is reported at 445 F.3d 1113. The district court's original opinion (App. 1-81) is not reported.

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254. The en banc court of appeals entered judgment in this case on May 5, 2010, and Justice Alito granted the petitioners' application (10A61) to extend the time to file a petition for a writ of certiorari until September 2, 2010.

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, is set forth at App. 197.

STATEMENT OF THE CASE

This case presents three important questions of law about Section 2 of the Voting Rights Act that need answers before the next round of redistricting begins—answers that will determine, among other things, how the Voting Rights Act applies in Indian Country and in small jurisdictions across the nation where statistical evidence of racially polarized voting is unavailable because there are too few precincts to permit statistical analysis. These questions arise in the context of a vote-dilution challenge to the aldermanic ward boundaries in the City of Martin, South Dakota.

The City of Martin adopts Ordinance 122.

Martin is a small city located between the Pine Ridge and Rosebud Indian reservations in southwestern South Dakota. It has a long and well-documented history of racial conflict between Indians and whites. *See, e.g., Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1007-08, 1030-33 (D.S.D. 2004) (making findings about Martin in the context of a challenge to a statewide redistricting plan), *aff'd*, 461 F.3d 1011 (8th Cir. 2006); Paula L. Wagoner, *"They Treated Us Just Like Indians": The Worlds of Bennett County, South Dakota* (2002).

According to the 2000 Census, Martin has a total population of 1,078 persons and a voting-age population of 737 persons. Approximately 45% of the city's total population and 36% of the city's voting-

age population is Native American.[1] The city's non-Indian population is almost 100% white.

In early 2002, amidst protests over claims of racial discrimination against Native Americans by the local sheriff and his deputies, Martin adopted the redistricting plan at issue in this case. That plan, known as Ordinance 122, divides the city into three wards. Each ward elects two aldermen to staggered two-year terms on the city council, and all three wards contain a white voting-age supermajority of at least 62%. *See* Table 1.

Table 1

Total Population and Voting-Age Population (VAP) by Ward under Ordinance 122

Ward	Total Pop.	Indian Pop.	Indian Pop.(%)	VAP	Indian VAP	Indian VAP(%)
I	352	165	46.88	236	90	38.14
II	361	177	49.03	237	86	36.29
III	365	143	39.18	264	90	34.09
Total	1,078	485	44.99	737	266	36.09

Indian voters challenge Ordinance 122.

Shortly after Ordinance 122 took effect, two Indian voters and residents of Martin challenged it in the district court, alleging that the ward

[1] Following the practice of petitioners Pearl Cottier and Rebecca Three Stars, both of whom are members of the Oglala Sioux Tribe, this petition uses the terms "Native American" and "Indian" interchangeably.

boundaries fragment Native American voting strength in violation of Section 2. After the completion of discovery, the district court held a nonjury trial over 11 days in June and July 2004.

With respect to the third *Gingles* precondition,[2] the plaintiffs presented evidence at trial to establish the identity of the Indian-preferred candidates in the seven aldermanic elections that had been held under Ordinance 122 between 2002 and 2004. They offered the testimony of five lay witnesses, all of whom are tribal members and have lived in the Martin area for virtually all of their lives. All five lay witnesses identified the same candidates as the candidates preferred by Indian voters in Martin in the 2002, 2003, and 2004 aldermanic elections.

The plaintiffs also offered several documentary exhibits corroborating the lay testimony. These exhibits included newspaper campaign advertisements, posters, and brochures created by the candidates themselves and by a local grass-roots organization of tribal members, the Lacreek District Civil Rights Committee, that had conducted get-out-the-vote campaigns in and around Martin during those elections.

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[2] In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court held that plaintiffs claiming vote dilution must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances...—usually to defeat the minority's preferred candidate." *Id.* at 50-51.

Because Ordinance 122 created only one precinct in each of the three aldermanic wards, statistical analysis of the municipal elections using the regression techniques discussed in *Gingles*—which require multiple precincts or datapoints—was impossible. *See, e.g.,* Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 147, n.19 (1992) (noting that ecological regression may be possible "if there are more than, say, six precincts"). The plaintiffs did, however, offer the results of exit polls conducted at the 2003 and 2004 elections which showed overwhelming Indian support for the candidates that the lay-witness testimony and documentary evidence had indicated were the Indian-preferred candidates.

All seven of the candidates identified by the plaintiffs as the Indian-preferred candidates were defeated in those elections.

The defendants did not dispute the identity of the Indian-preferred candidates by offering testimony or other evidence that Indian voters did not prefer those candidates or that someone else was the Indian-preferred candidate in those seven elections. The defendants did, however, offer evidence suggesting that Native Americans in Martin don't all think alike—a fact that is not in dispute.

Table 2 summarizes the results of the 2002-2004 aldermanic elections in the City of Martin and identifies the Indian-preferred candidates.

Table 2

Aldermanic Elections under Ordinance 122

Year	Ward	Candidates	Winner
2002	I	Rodney Anderson Rebecca Three Stars*	Anderson
	II	Robert Fogg* Donald Moore	Moore
	III	Brad Otte Zane Zieman*	Otte
2003	I	Charles Gotheridge* Molly Risse	Risse
	III	Todd Alexander Doug Justus*	Alexander
2004	II	Robert Fogg* E.R. Hicks John Vickery, Jr.	Hicks
	III	Doug Justus* Helen Kennedy Brad Otte	Otte

*Identified as the Indian-preferred candidate by the plaintiffs' nonstatistical evidence.

In addition to their evidence regarding aldermanic elections held under Ordinance 122, the plaintiffs also offered statistical evidence of federal, state, and county elections to further demonstrate the extent of racially polarized voting in Martin. The plaintiffs' expert statistician, Dr. Steven P. Cole, analyzed data from all of the precincts in Bennett County, of which Martin is the county seat, using a statistical technique capable of estimating voter preferences by race in the city. Cole analyzed 35

nonmunicipal elections and found, among other things, that the candidate preferred by Indian voters in Martin lost in the city's precincts in 6 of the 7 contests that featured an Indian candidate and 18 of the 35 races overall. The defendants' expert, Dr. Ronald E. Weber, analyzed the same elections using the same technique and produced nearly identical results, showing that the Indian-preferred candidate lost in the city in 6 of the 7 interracial elections and 19 of the 35 elections overall.

The plaintiffs also presented evidence regarding the other two *Gingles* preconditions, the nine so-called "Senate factors" identified in the Senate report on the 1982 amendments to Section 2 as probative of vote dilution, *see Gingles*, 478 U.S. at 44-45, and one additional factor, proportionality, which this Court has also found to be relevant among the totality of circumstances, *see Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994). This included evidence of South Dakota's long history of *de jure* and *de facto* voting discrimination against Native Americans as well as Martin's own history of racial conflict.

The district court initially rules for the City.

In March 2005, the district court issued an opinion and order in which it found that the plaintiffs had satisfied the first and second *Gingles* preconditions but had failed to establish the third. In reaching that conclusion, the court rejected the plaintiffs' nonstatistical evidence regarding municipal elections and relied exclusively on statistical evidence from nonmunicipal elections.

The court turned first to the plaintiffs' 2003 exit poll, finding that it had identified the Indian-preferred candidates in that election (Justus and Gotheridge) and that both of them had been defeated. The court concluded, however, that those two defeats were "not sufficient proof of polarization" because white voters had participated in the exit poll at a lower rate than Indian voters. (App. 56.) The court did not discuss the 2004 exit poll, which it had refused to admit into evidence because the election had occurred just weeks before the beginning of the trial.

The court focused next on nonmunicipal elections. In so doing, the court considered 50 contests—significantly more than the parties had offered on the third *Gingles* precondition. This discrepancy is the result of two factors. First, the court included all primary elections in its analysis and thereby double-counted some elections. Second, the court considered multi-seat elections that the parties had omitted from their analyses of the third *Gingles* precondition because the available statistical techniques could not isolate the preferences of the city's voters from the preferences of the county's voters in those elections. The record only contains the results of those elections at the county level, where Native Americans make up approximately 57% of the county's total population and 50% of the county's voting-age population. (App. 97.)

The court then divided those 50 elections into five categories of descending importance, identified the Indian-preferred candidates, and tallied up wins

and losses. (App. 56-76.) Table 3 presents a summary of the district court's findings.

Table 3

District Court's Original Findings of Indian-Preferred Candidates ("IPC") in Nonmunicipal Elections

Election Type	W	L	No IPC
Interracial, multi-candidate, countywide offices	5	4	0
Interracial, head-to-head, countywide offices	1	2	1
Interracial, head-to-head, state offices	0	3	0
White only, countywide offices	1	1	1
White only, state and federal offices	17	14	0
Total	24	24	2

Reviewing its tallies, and apparently counting elections in which the court identified no Indian-preferred candidate as victories for Indian voters, the court observed that the Indian-preferred candidates lost more often than not in only one of the five categories. It concluded that this did not support a finding that white voters voted sufficiently as a block "usually" to defeat the Indian preferred candidates under Ordinance 122.

Finally, the court discussed the testimony of the plaintiffs' lay witnesses and rejected it as insufficient to prove racial polarization. Noting that this testimony, some of which it had earlier found to be "reliable," "credible," and worthy of "great weight" (App. 47-49), did not eliminate "other considerations for candidate losses" such as "platform popularity" and "candidate characteristics," the court concluded that "this lay testimony is not sufficient to meet plaintiffs' burden of demonstrating the usual defeat of the Indian-preferred candidate" under Ordinance 122. (App. 76.) The court did not discuss the plaintiffs' documentary evidence, and it made absolutely no findings regarding the identity of the Indian-preferred candidates in the 2002 and 2004 aldermanic elections or whether those candidates were defeated.

The court then concluded that the plaintiffs could not prevail on their vote-dilution claim and entered judgment for the defendants.

A panel of the court of appeals reverses and remands.

The plaintiffs appealed, and a panel of the Eighth Circuit reversed. On the third *Gingles* precondition, the panel held that the district court's findings had been clearly erroneous "in three respects when it determined the white majority usually did not defeat the minority-preferred candidate." (App. 93.)

First, it was "clear error" for the district court to reject evidence from the plaintiffs' 2003 exit poll (App. 94), the results of which "clearly showed racial

polarization" (App. 98). The panel acknowledged that whites were underrepresented in the poll, but it recognized that, because whites are the only other racial group in Martin, "the only conceivable explanation for the results of the exit poll and the final election tallies is that the white majority voted as a bloc against Indian-preferred candidates." (App. 94.)

Second, the district court "clearly erred" when it "ignored the results of the 2002, 2003, and 2004 aldermanic elections." (App. 95.) Reviewing the record, the panel found that the Indian-preferred candidates lost in all of the aldermanic elections held under Ordinance 122 in those three election cycles. The court found this to be "striking proof of vote dilution." (App. 95-96.)

Third, the district court should not have relied exclusively on the results of nonmunicipal elections, which provide "very little evidence of whether Martin's ward system allows Native-Americans to elect their preferred candidates." (App. 96.) The panel also observed that, while it can be appropriate for a court to consider exogenous elections, those elections are "meant to supplement, not replace, endogenous elections."[3] (App. 96.)

Concluding that the plaintiffs had established all three *Gingles* preconditions, the panel then remanded the case to the district court for further

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[3] "'Endogenous' elections are elections for the offices that are at issue in the litigation." *Cofield v. City of LaGrange*, 969 F. Supp. 749, 760 (N.D. Ga. 1997). "'Exogenous' elections are any elections other than the elections for the offices at issue." *Id.*

findings on the Senate factors to determine whether Ordinance 122 diluted Indian voting strength.

The defendants sought rehearing en banc, and the full Eighth Circuit denied that request by a vote of six to five. The defendants did not seek review in this Court.

The district court rules for Indian voters on remand.

On remand, the district court made additional findings of fact in a nearly 50-page opinion before concluding that Ordinance 122 violates Section 2 by fragmenting Indian voters. (App. 109-54.) Among other things, the court made the following additional findings with respect to racially polarized voting in Martin based on its own review of the record:

- "[T]here is a persistent and unacceptable level of racially polarized voting in the City of Martin." (App. 126.)
- "[E]lections in the City of Martin are racially polarized to a high degree." (App. 129.)
- "[T]he statistical evidence ... shows overwhelming levels of racially polarized voting." (App. 130.)

Overall, the district court found that seven of the ten factors it considered under the "totality of circumstances" weighed in the plaintiffs' favor. The court then made its ultimate finding "based on the totality of the circumstances" that "Ordinance 122 creates a districting plan that fragments Indian voters among all three wards, thereby giving Indians

'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" (App. 153.)

Based on this finding, the district court entered judgment for the plaintiffs.

The en banc court of appeals affirms the district court's original ruling.

The defendants appealed that judgment, and a second panel of the Eighth Circuit affirmed, concluding that the district court's ultimate finding of vote dilution was not based on a misreading of the governing law and was supported by substantial evidence in the record.

The defendants then filed a second petition for rehearing en banc, focusing this time on the second panel's affirmance of the district court's remedial order. The petition for rehearing did not even mention the district court's ultimate finding of vote dilution.

The en banc court granted rehearing in February 2009 and vacated the second panel's opinion and judgment. The court called for no additional briefing. In August 2009, while the case was awaiting oral argument, the court informed the parties that it "may wish to consider and question counsel regarding issues decided" by the first panel. The full court then heard oral argument a month later and asked no questions of either party about the third *Gingles* precondition.

In June 2010, a divided court issued a 7-4 decision purporting to affirm the district court's

original judgment based on its finding that the plaintiffs had not established the third *Gingles* precondition. (App. 155-96.) In reaching that conclusion, the majority disagreed with each of three points in the first panel's analysis.

First, the majority concluded that it was not clearly erroneous for the district court to have given the 2003 exit poll no weight because there were "reasonable grounds" for it to view the poll as unreliable. (App. 167.) Second, the court ruled that the district court did not err "when it declined to consider the results of aldermanic elections from 2002-2004 as evidence of racial bloc voting," due to the absence of statistical evidence regarding those elections. (App. 172.) Third, the majority concluded that the district court did not err in relying exclusively on nonmunicipal elections and that the data in the record did not "demonstrate that the district court's overall finding as to the third *Gingles* factor was clearly erroneous." (App. 168.)

Reviewing the data upon which the district court had relied, the court tallied up 17 wins and 18 losses for the Indian-preferred candidates in Martin in the 35 nonmunicipal elections with respect to which the parties had been able to estimate voter preferences in the city and had supplied city election results. *See* Table 4. The court recognized that the Indian-preferred candidate had been defeated in 6 of the 7 interracial contests, but it found that these were outweighed by the greater success of Indian-preferred candidates in contests featuring only white candidates. The court also held that it was not improper to aggregate the results of primary and

general elections. Noting that there were "almost equal numbers of victories for Indian-preferred candidates and non-Indian-preferred candidates," the court concluded that its tally did not compel a finding that the white majority usually defeated the Indian-preferred candidates. (App. 169.)

Table 4

En Banc Court's Analysis of Nonmunicipal Elections based on City Election Results

Election Type	W	L
Interracial, head-to-head, countywide offices	1	3
Interracial, head-to-head, statewide offices	0	3
White only, state and federal offices	15	10
White only, countywide offices	1	2
Total	17	18

The majority then turned to the nonmunicipal elections with respect to which the record contains only estimates of voter preferences and results at the county level, and it found 7 victories and 8 defeats for the Indian-preferred candidates. *See* Table 5. The majority concluded that those results did not establish clear error. The court also concluded that it was not clearly erroneous for the district court to rely on countywide estimates of voter preferences and countywide results. (App. 168-69.)

Table 5

En Banc Court's Analysis of Nonmunicipal Elections based on County Election Results

Election Type	W	L
White only, multi-candidate, state and federal offices	2	4
Interracial, multi-candidate, countywide offices	5	4
Total	7	8

Overall, the en banc court found that the Indian-preferred candidates had been defeated in 26 out of 50 elections (52%). It described this evidence as "mixed" and concluded that it did not establish "that white voters typically vote as a bloc to defeat Indian-preferred candidates in the City." (App. 171-72.)

In light of its decision that the district court's original finding was not clearly erroneous, the majority concluded that it need not consider the district court's analysis of the totality of circumstances or its ultimate finding of vote dilution. It vacated the district court's judgment in favor of the plaintiffs and remanded the case to the district court with instructions to dismiss.

REASONS TO GRANT THE PETITION

The decision below raises a threshold question of appellate jurisdiction that uniquely calls for an exercise of this Court's supervisory authority. The Eighth Circuit did not directly address the jurisdictional issue, but its judgment resolves it in a way that appears to conflict with the Federal Rules of Civil Procedure and at least six decisions of this Court. This Court should grant review to answer the question and to resolve these conflicts. *See* Sup. Ct. R. 10(a), (c).

On the merits, the judgment below conflicts with two decisions of this Court and with the decisions of at least six federal courts of appeals. The Court should grant review to resolve these conflicts over the proper application of the third *Gingles* precondition. *See* Sup. Ct. R. 10(a), (c).

The Court should also grant review because of the importance of the federal questions involved. The answers will determine whether and how the Voting Rights Act applies in jurisdictions where statistical evidence is unavailable, and they will help to define what equal electoral opportunity means in an era where racially polarized voting still exists but may have taken subtler or more nuanced forms.

These questions need answers now, before the next round of decennial redistricting begins in earnest, and particularly before it begins in the small cities and towns that are most likely to be affected by this Court's ruling. These places need to know whether the impossibility of statistical analysis effectively shields them from liability under the

Voting Rights Act and therefore frees them to draw districts without substantial regard for minority voting rights. Although that result seems hardly what Congress intended when it passed the Act, it is an entirely foreseeable consequence if the en banc decision below is left to stand.

I. The en banc decision presents an important question of appellate jurisdiction that calls for an exercise of this Court's supervisory powers.

The complex procedural posture of this case presents a difficult but important threshold question of appellate jurisdiction. Was the district court's original finding that the plaintiffs had *not* satisfied the third *Gingles* precondition properly before the en banc court after remand? Concluding that it was, the court reviewed that finding for clear error rather than reviewing the district court's post-remand finding, based on the totality of circumstances, that Ordinance 122 denies Indian voters in Martin an equal opportunity to elect aldermen and alderwomen of their choice.

The dissenters below argued that prudential considerations should have precluded the court from reviewing the original finding in the second appeal. (App. 174-79.) The petitioners agree, particularly because: (1) neither party sought en banc review of the original finding in *Cottier II*; and (2) the majority could not justify its review on a change in the facts, a change in the law, or a need to secure or maintain the uniformity of the circuit's decisions.

But the issue is also jurisdictional. Under 28 U.S.C. § 1291, which was the en banc court's only basis for jurisdiction, the court of appeals could review the "final decisions" of the district court and any non-final decisions that merged into its final judgment. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The classic statement of the so-called "merger rule" is as follows: "An appeal from a final judgment usually draws into question all prior non-final orders and all rulings *which produced the judgment.*" 20 *Moore's Federal Practice* ¶ 303.21[3][c][iii] (3d ed. 2001) (emphasis added). In this case, however, the district court's original finding that the plaintiffs had *not* established the third *Gingles* precondition cannot possibly have merged into its final judgment in the plaintiffs' favor because the two rulings are legally incompatible. Failure to establish a precondition precludes judgment in the plaintiffs' favor. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (reversing an ultimate finding of vote dilution after concluding that the plaintiffs could not satisfy the third *Gingles* precondition as a matter of law). Rather, the final judgment after remand superseded the original, conflicting finding and judgment. As a result, the en banc court had no jurisdiction to review the district court's original finding.[4]

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[4] This Court will hear oral argument on November 1, 2010, in a case that may shed further light on the merger rule and appellate jurisdiction. In *Ortiz v. Jordan*, 316 Fed. Appx. 449 (6th Cir. 2009), *cert. granted*, 130 S.Ct. 2371 (Apr. 26, 2010) (No. 09-737), the question presented is whether a party may appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial.

This conclusion is consistent with the purpose of the merger rule, which is to "permit[] review" of rulings that would otherwise be unappealable under § 1291 because of the final-judgment rule. 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3905.1 at 250 (2d ed. 1992). There was no need for review in *Cottier II* because the defendants had a full opportunity for review in *Cottier I*.

This does not mean, of course, that the en banc court could not consider whether the plaintiffs had satisfied the *Gingles* preconditions. As *Voinovich* demonstrates, satisfaction of those preconditions is implicit in an ultimate finding of vote dilution, which can then be reversed if a reviewing court determines that a plaintiff failed to satisfy a precondition as a matter of law. 507 U.S. at 158. But the majority made no such determination here.

Instead, the majority set aside the district court's ultimate finding of vote dilution, and the judgment based upon that finding, after concluding only that the record contained enough evidence to support a finding that the plaintiffs had *not* satisfied the third *Gingles* precondition. That approach is plainly inconsistent with Rule 52(a) and with the six

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The outcome of that case could turn on whether an order denying summary judgment merges into a post-trial final judgment or is superseded by it. The answer to that question could therefore make it even clearer that the en banc court did not have jurisdiction to review the district court's original finding that the plaintiffs had not satisfied the third *Gingles* precondition. Thus, at a minimum, the Court should hold this petition pending resolution of *Ortiz*.

decisions of this Court holding that an ultimate finding of vote dilution is subject to the clearly-erroneous standard of review. *LULAC v. Perry*, 548 U.S. 399, 437 (2006); *Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994); *Gingles*, 478 U.S. at 78-79; *Rogers v. Lodge*, 458 U.S. 613, 622-27 (1982); *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *White v. Regester*, 412 U.S. 755, 765-70 (1973).

This Court should therefore grant review to answer the threshold question and to resolve this apparent conflict. *See, e.g, Nguyen v. United* States, 539 U.S. 69, 74 (2003) (granting certiorari to resolve a question of appellate jurisdiction as an exercise of the Court's supervisory power). Because the Eighth Circuit did not consider this question as a matter of jurisdiction, it would also be appropriate to grant certiorari, vacate the judgment below, and remand the case ("GVR") to allow that court to consider the issue in the first instance. As this Court has observed, a GVR "assists the court below by flagging a particular issue that it does not appear to have fully considered" and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also Youngblood v. West Virginia*, 547 U.S. 847, 870 (2006) (using GVR where state supreme court failed to address federal issue presented to it).

II. On the merits, the judgment below conflicts with decisions of this Court and with decisions of at least six other federal courts of appeals.

The Eighth Circuit's judgment below also conflicts with decisions of this Court and several other circuits on two questions concerning the application of the third *Gingles* precondition. First, on the question of whether statistical evidence is required, the en banc ruling conflicts with decisions of the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Tenth Circuit, and the Eleventh Circuit, and it conflicts with this Court's substantial discussion of the issue in *Gingles*. Second, on the question of whether the third *Gingles* factor is satisfied if Indian voters can only elect candidates of choice in exogenous elections, when Indian voters are a majority of the electorate, or when those candidates are white, the en banc court's analysis of nonmunicipal elections conflicts with *De Grandy* and with at least six sister circuits. These conflicting interpretations of federal law present independent bases for certiorari. *See* Sup. Ct. R. 10(b).

A. The Eighth Circuit's rejection of nonstatistical evidence conflicts with *Gingles* and with every other circuit court that has considered the issue.

The circuit courts are split on the question of whether statistical evidence is required to prove the third *Gingles* precondition. On the one hand, the Third, Fourth, Fifth, Tenth, and Eleventh Circuits have followed this Court's discussion of the issue in

Gingles and have held that statistical evidence is not required. On the other hand, the Eighth Circuit has now held that it is.

In *Gingles*, this Court touched on the issue three times. First, the Court noted with approval that the district court had relied on lay-witness testimony in addition to statistical evidence presented by the parties' experts. 478 U.S. at 52. Second, the Court forcefully rejected the suggestion that racially polarized voting could only be proved by statistical evidence from multiple regression analyses which take account of variables other than race that might explain voter preferences. *Id.* at 61-73. The Court reasoned that requiring such statistics would make proof of polarization "prohibitively expensive" and more burdensome than Congress intended. *Id.* at 73. And third, the Court in a footnote directed the lower courts to "rely on other factors that tend to prove unequal access to the electoral process" when statistical evidence is unavailable. *Id.* at 57 n.25.

Every circuit court that has subsequently dealt with the issue, other than the Eighth Circuit, has followed that direction.

The Fifth Circuit addressed the question in three separate decisions issued in the aftermath of *Gingles*. In *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1120 n.15 (5th Cir. 1991), the Fifth Circuit flatly rejected the city's argument that the paucity of statistical evidence from municipal elections meant that the plaintiffs had failed to establish the third *Gingles* precondition: "While statistical evidence of racial polarization is

most commonly employed to make this showing, this Court . . . has held that such statistical evidence is not required." *See also Brewer v. Ham*, 876 F.2d 448, 453-44 (5th Cir. 1989) (observing that statistical evidence is not required); *Overton v. City of Austin*, 871 F.2d 529, 538-40 (5th Cir. 1989) (holding that nonstatistical evidence could outweigh statistical evidence of polarization).

Several years later, the Fifth Circuit confronted the question again under circumstances very similar to this case. Statistical evidence was unavailable in *LULAC v. Roscoe Independent School District*, 123 F.3d 843 (5th Cir. 1997), because the defendant school district, like the City of Martin, uses only one polling place. *See id.* at 847. Instead, the plaintiffs introduced an exit poll and other evidence to prove racial polarization. But unlike this case, the *Roscoe* defendants also introduced substantial nonstatistical evidence on the third *Gingles* precondition. Specifically, the school district offered the testimony of Mexican-American lay witnesses who identified Jose Villafranca as the Latino-preferred candidate in the 1991 and 1993 school board elections, both of which he won. *See id.* at 847-48. The Fifth Circuit held that this evidence showed a lack of racial polarization and was enough to affirm the district court's finding that the plaintiffs had not established the third *Gingles* precondition. *Id.* at 848.

The Eleventh Circuit addressed the question in *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992), *rev'd on other grounds*, 512 U.S. 874 (1994). At issue was the method of electing the county commission in

Bleckley County, Georgia. While the case was pending, the entire county was consolidated into a single precinct, making statistical analysis impossible. 955 F.2d at 1571 n.12. The district court restricted its review to the available statistical evidence and held that the relative paucity of that evidence in the record undermined the plaintiffs' attempt to establish the third *Gingles* precondition. The Eleventh Circuit reversed. *Id.* at 1569-73. The court of appeals observed not only that "the use of non-expert testimony and nonstatistical evidence has been approved by this court as a means of proving racially polarized voting," *id.* at 1570, but also that the nonstatistical evidence in the record, including lay testimony, "conclusively establishes a pattern of racially polarized voting in Bleckley County," *id.* at 1573; *see also Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987) (noting that it is "clearly acceptable" to use non-expert testimony in establishing racially polarized voting).

In another case, the Fourth Circuit considered a challenge to the at-large system of electing the city council in Norfolk, Virginia. *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989). The district court found that the parties' statistical analyses were methodologically flawed, and it relied instead on a variety of nonstatistical evidence to identify the minority-preferred candidates in city elections. The court concluded on the basis of that evidence that the plaintiffs had not established the third *Gingles* precondition. In reversing, the Fourth Circuit took issue not with the district court's rejection of the

statistical analyses but with the court's failure to give enough weight to the testimony of lay witnesses that certain candidates were not the black community's candidates of choice. *Id.* at 1238-39. That testimony was ultimately dispositive on the third *Gingles* precondition, the court of appeals held, because it revealed that black voters had actually enjoyed very little success in municipal elections. *Id.* at 1239.

The Third and Tenth Circuits have likewise followed *Gingles* in approving the use of lay witness testimony to prove the second and third *Gingles* preconditions. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126-27 (3d Cir. 1993) (observing that the plaintiffs' burden on the third *Gingles* precondition "may be satisfied with a variety of evidence, including lay testimony or statistical analyses of voting patterns"); *Sanchez v. Bond*, 875 F.3d 1488, 1493-94 (10th Cir. 1989) ("We find nothing in *Gingles*, however, to suggest that a trial court is prohibited from considering lay testimony. . .").

Many district courts have also credited lay testimony for the purposes of establishing the *Gingles* preconditions. *See e.g., Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1168 (D. Col. 1998) (finding competent lay testimony to be "strongly persuasive and highly probative of minority vote dilution"); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 776 (N.D. Ga. 1997) (considering lay testimony to be an essential part of the totality of circumstances analysis where statistical evidence was not

determinative); *Jackson v. Edgefield County, S. C. Sch. Dist.*, 650 F. Supp. 1176, 1198 (D.S.C. 1988) (finding lay testimony "even more persuasive" than statistical analyses); *Windy Boy v. Big Horn County*, 647 F. Supp. 1002, 1013 (D. Mont. 1986) (relying on the "testimony of observers of the Big Horn County politics").

Standing in contrast to these decisions is the Eighth Circuit's en banc ruling below. The panel decision in *Cottier I* held that the district court had wrongly rejected the plaintiffs' nonstatistical evidence, which it described as "striking proof of vote dilution." (App. 95.) The en banc court's holding that a district court need not even make findings identifying the minority-preferred candidates in the absence of statistical evidence is irreconcilable with the decisions above. The Court should therefore grant certiorari to resolve this circuit split.

B. The Eighth Circuit's analysis of nonmunicipal elections conflicts with *De Grandy* and with decisions of other circuits.

Even if it were appropriate for the district court to rely exclusively on nonmunicipal elections in this case, the en banc court's review of those elections makes two critical mistakes. First, in conflict with decisions of this Court and with at least three other courts of appeals, the court counted victories in which the Indian-preferred candidate won only at the county level, where Indians constitute a sizable majority of the population. Second, in conflict with at least six other circuits, the

court gave the same probative value to elections in which the Indian-preferred candidate was white as it did to elections in which the Indian-preferred candidate was Indian. Both of these errors led the court to overstate the extent to which Indian voters had been able to elect candidates of their choice and led the court to find equal electoral opportunity where in fact none exists.

1. In its original statement of the third *Gingles* precondition, this Court suggested that the inquiry should focus on districts with a "white majority." *Gingles*, 478 U.S. at 50; *see also id.* at 51 (holding that the minority proves the third precondition by showing that "submergence in a white multimember district impedes its ability to elect its chosen representatives" because the district's "white majority" votes sufficiently as a bloc).

Although there were no majority-black districts at issue in *Gingles*, the Court confronted the issue more directly in *Johnson v. De Grandy*, 512 U.S. 997 (1994). In that case, the plaintiffs challenged a plan that included both majority-minority districts and majority-white districts. The district court concluded that the plaintiffs had satisfied the third *Gingles* precondition and this Court ratified that conclusion when it acknowledged the district court finding that there was a "tendency of non-Hispanic whites to vote as a bloc to bar minority groups from electing their chosen candidates *except in a district where a given minority makes up a voting majority*." *Id.* at 1003-04 (emphasis added).

The Ninth Circuit followed that aspect of *De Grandy* in *Old Person* v. *Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000). The court recognized that Indian electoral success in majority-Indian districts was relevant to consider only in the totality of the circumstances inquiry with regard to proportionality and proportional representation. "To do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-Indian districts." *Id.* at 1122; *see also Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) (polarization shown where minorities almost never win unless the district was majority-minority).

The Eighth Circuit followed *De Grandy* and *Old Person* and reached the same conclusion in an earlier case involving South Dakota's statewide redistricting plan. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1027 (8th Cir. 2006).

In this case, however, the Eighth Circuit held that it was appropriate for the district court to base its conclusion with respect to the third *Gingles* precondition in part on the success or failure of Indian-preferred candidates at the county level, where Indians make up approximately 57% of the total population and 50% of the voting-age population—substantially more than the 45% and 36% that Indians make up of the total and voting-age population, respectively, in Martin.

This error led the court to vastly overestimate the degree to which Indian voters had been able to elect candidates of choice. County results showed Indian-preferred candidates winning the county only

7 out of 15 (47%) times, but election returns on file with the court showed the same Indian-preferred candidates winning the city only 1 out of 15 times (7%). (App. 168.)

2. The courts of appeals have long been divided on how much probative value, if any, to give elections involving only white candidates in an analysis of white bloc voting.

On the one hand, the Fifth Circuit has excluded elections involving only white candidates in its analysis of the third *Gingles* precondition. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987). In doing so, the court took its cues from *Gingles*:

> [W]e conclude that *Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate. . . . The various *Gingles* concurring and dissenting opinions do not consider evidence of elections in which only whites were candidates. Hence, neither do we.

834 F.2d at 503-04; *see also Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988).

The Tenth Circuit, on the other hand, has refused to exclude all-white elections from its analysis of the third *Gingles* precondition, and it has even held all-white elections to be dispositive. In *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), the court held that elections with only white candidates

are relevant to the third *Gingles* precondition so long as one of the candidates can properly be deemed a candidate of choice of minorities. *Id.* at 1495. The defendants in that case introduced evidence that Hispanics were influential in the Democratic Party and that the support of Hispanics was necessary to secure the Democratic nomination for county offices. The defendants also introduced evidence that Hispanics selected and supported white Democratic candidates for county office. The court concluded that the lower court did not err in finding that "Hispanics had been able to elect several county commissioners, even if the successful candidates were Anglos," and despite the fact that no Hispanic candidate had ever been elected to the county commission. *Id.* at 1496.

The Fourth Circuit has agreed with the Tenth. *See Lewis v. Alamance County*, 99 F.3d 600, 606 (4th Cir. 1996). "Section 2 prohibits any election procedure which operates to deny to minorities an equal opportunity to elect those candidates whom they prefer, *whether or not those candidates are themselves of the minority race.*" *Id.* The court ruled that the district court had erred in excluding elections involving only white candidates from its analysis, but it ultimately concluded that the exclusion was harmless error. *See id.* at 608-09.

The First, Second, Third, Sixth, Ninth and Eleventh circuits have adopted an intermediate position. They hold that elections involving only white candidate are relevant to the third *Gingles* precondition but should carry less evidentiary weight than elections providing voters with a racial choice.

See United States v. Blaine County, 363 F.3d 897, 911 (9th Cir. 2004) (contests between white and Indian candidates are most probative of bloc voting); *Old Person v. Cooney*, 230 F.3d 1113, 1123-24 (9th Cir. 2000) ("Elections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting."); *Rural West Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835, 840 (6th Cir. 2000) (courts may consider white-white contests in assessing claims of vote dilution, but they are not "necessarily entitled to the same weight as those involving a minority candidate"); *Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc) (elections in which only white candidates participate are not as probative as elections involving minority candidates, except where black voters strongly support a particular white candidate); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir. 1993) (elections involving only white candidates are generally less probative than elections involving white and minority candidates).

The most common rationale for the intermediate position traces back to Judge Richard Arnold's pithy observation that equal opportunity is absent when "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (three-judge district court), *aff'd mem.*, 488 U.S. 988 (1988); *see, e.g, Ruiz v. City of Santa Monica*, 160 F.3d 543, 552-53 (9th

Cir. 1998)(quoting *Smith*); *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994)(same).

The petitioners believe that the intermediate position is the closest to what the *Gingles* court intended and is most in keeping with Section 2 itself. Keeping "equal political opportunity as the focus of the enquiry," *De Grandy*, 512 U.S. at 1014, elections with only white candidates can shed some light on the existence of racial polarization, but they do not tell the whole story.

3. Here, the en banc court lumped all election results together into a single tally, giving victories at the county level the same probative value as victories at the city level and giving victories of white Indian-preferred candidates the same value as victories of Indian Indian-preferred candidates.

Had the court employed the more nuanced analysis required by *De Grandy* and used by the plurality of the circuits, it would have reached a very different result. White voters in Martin defeated 6 out of 6 (100%) Indian-preferred candidates when Indian voters preferred an Indian candidate, and they defeated 12 out of 29 (41%) Indian-preferred candidates when Indian voters preferred a white candidate. That result seems incompatible with Section 2's guarantee of equal electoral opportunity.

In any event, this Court should grant certiorari to resolve these circuit conflicts.

III. This case raises issues of exceptional national importance needing speedy resolution.

The right to vote is the most fundamental right in our democratic system of government because its free and effective exercise is preservative of all other basic civil and political rights. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). President Reagan rightly described it as "the crown jewel of American liberties."[5] Congress adopted the Voting Rights Act of 1965 to protect this important right and to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Forty-five years later, "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (plurality opinion). The Act's proper and consistent application therefore remains vital to our Nation and to the individual rights of its citizens.

The decision below raises important issues that must be resolved if the Voting Rights Act is to be applied consistently throughout the country and in a matter that effectuates its stated purpose.

First, by holding that the district court could properly disregard stark racial polarization in municipal elections because of the absence of

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[5] President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982, June 29, 1982, http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm.

statistical evidence, the decision has opened a split among the circuits and has ripped a potentially enormous loophole into the Act's coverage. If statistical evidence is required to prove the third *Gingles* precondition, then Section 2 is effectively unenforceable against vote dilution when statistical evidence is unavailable.

The statistical techniques commonly used in voting cases generally require more than a handful of precincts. This means that the loophole will most often be an issue in jurisdictions, like Martin, that have only a small number of precincts and where the only hope of producing any kind of statistical evidence depends on an analysis of exogenous elections using data from a much larger area. The loophole is likely to widen in the coming years, moreover, as technological advances and economic concerns prompt more jurisdictions to consolidate and reduce their number of precincts. *See, e.g.*, Tim Chitwood, *Feds OK Local Voting Precinct Consolidation*, Columbus Ledger-Enquirer, June 8, 2010.

This widening loophole is plainly at odds with the goal of ridding the country of racial discrimination in voting. Cities, towns, and counties with too few precincts to enable reliable statistical analyses of their elections will have little incentive to ensure that minority voters within their midst have an equal opportunity to elect candidates of their choice. Unscrupulous jurisdictions could consolidate precincts in an attempt to evade potential liability. *See, e.g. Hall v. Holder*, 757 F. Supp. 1560, 1573 n.22, 1578 (M.D. Ga. 1991), *rev'd*, 955 F.2d 1563 (11th Cir.

1992), *rev'd on other grounds*, 512 U.S. 874 (1994). Minority voters in those places will have no way to remedy vote dilution without proving that government officials violated the Constitution by acting with a discriminatory intent—a result that defeats the very purpose for which Congress amended Section 2 in 1982. *See Gingles* 478 U.S. at 35 ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone"); *see also id.* at 43-44 (explaining Congress' repudiation of the intent test).

Second, by holding that Indian voters' utter inability to elect candidates of choice in nonmunicipal elections in Martin when those candidates are Indian could be outweighed by evidence of Indian voters' ability to elect some candidates of choice at the county level or when their preferred candidates are white, the decision below loses sight of equal electoral opportunity. Defending against Section 2 claims will become an exercise in finding enough elections of remote importance to mask the results of elections that truly matter. Without guidance on the probative value to assign to specific elections, the third *Gingles* factor becomes largely a matter of the judge's discretion.

That discretion would erase "clear lines for courts and legislatures alike." *Bartlett*, 129 S. Ct. at 1244 (describing the need for clear standards on the first *Gingles* precondition). Legislators and litigants would have difficulty making any sort of predictive judgments about potential liability under Section 2 when drawing districts or when faced with a potential claim. That uncertainty could lead

decision-makers to rely on racial considerations in redistricting more than necessary or less than necessary to ensure equal opportunity, and it is a recipe for encouraging protracted litigation over claims that fall in the gray area on either side of what otherwise might have been a bright line.

Moreover, if the Court does not resolve these important issues before the next round of redistricting begins in earnest, election districts will be drawn throughout the country with different standards used in different circuits. The States and especially their local government subdivisions need to know the answer to these questions now.

IV. This case is a good vehicle for deciding the *Gingles* questions because the evidence of racial polarization is overwhelming.

The evidence of racially polarized voting in this case is clear and uncontroverted. This clarity allows the Court to address the important underlying legal questions with a minimum of factual complexity.

In aldermanic elections, the evidence in the record consists of lay-witness testimony corroborated by documentary exhibits and exit polls, and it shows that the Indian-preferred candidates for the city council were defeated by white voters in 7 out of 7 (100%) elections whether those candidates were Indian or non-Indian. And that evidence is entirely uncontroverted. Nowhere does the record contain one witness or document suggesting, for example, that Rod Anderson, and not Rebecca Three Stars,

was the Indian-preferred candidate in Ward I in the 2002 municipal election. The city offered some testimony that all Indians do not think alike, but that fact is entirely unremarkable. It is certainly no justification for the district court's failure to make findings of fact.

It was only the district court's insistence that the third *Gingles* precondition requires statistical evidence, reversed by *Cotter I* but upheld by *Cottier II*, that enabled the court to ignore this pattern of universal defeat. "Usual" defeat for purposes of the third *Gingles* precondition cannot get any clearer than universal defeat. This petition thus presents the Court with a stark choice between *Cottier I* and *Cottier II* on the question of nonstatistical evidence.

Evidence of polarization is just as stark in nonmunicipal elections. That evidence consists of nearly identical statistical analyses produced by both parties' experts. And even if one takes the en banc court's tallies at face value,[6] it is apparent that Indian voters had absolutely no success in electing their preferred candidates except when those candidates were white or when the court looked to results at the county level where Indians are a majority of the population. Indian-preferred candidates who were Indian lost in the city in 6 out of 6 (100%) elections. Indian-preferred candidates who were white fared much better, often because

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[6] The petitioners accept those tallies at face value for purposes of this petition but reserve the right to identify other errors that tended to overstate Indian electoral success, such as the double-counting of primary-election victories, in a brief on the merits.

they were also the preferred candidates of white voters.

The nonmunicipal elections thus present the Court with a clear opportunity to decide whether and how it is appropriate to include, for purposes of the third *Gingles* precondition, exogenous elections in which the minority group constitutes a majority of the population and elections in which the minority-preferred candidate is white. Only by aggregating all elections and weighing them equally was the en banc court able to rule, in effect, that Native Americans in Martin have an equal opportunity to elect candidates of their choice.

CONCLUSION

The Court should grant certiorari to review the judgment of the Eighth Circuit.

In the alternative, the Court should grant, vacate, and remand the case to the Eighth Circuit to allow it to consider the jurisdictional question in the first instance, or it should hold the petition pending the Court's resolution of *Ortiz v. Jordan*, 09-737, which could significantly affect the answer to the jurisdictional question.

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

PEARL COTTIER and REBECCA THREE STARS,

Plaintiffs,

vs.

CITY OF MARTIN; TODD ALEXANDER, ROD ANDERSON, SCOTT LARSON, DON MOORE, BRAD OTTE, and MOLLY RISSE, in their official capacities as members of the Martin City Council; and JANET SPEIDEL, in her official capacity as Finance Officer of the City of Martin,

Defendants.

CIV. 02-5021-KES

2005 DSD 8

MEMORANDUM OPINION AND ORDER

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INTRODUCTION

Plaintiffs allege that the City of Martin Ordinance 122 dilutes the voting strength of Indians by fragmenting the Indian voters into three wards, which has the result and effect of denying the right of Indians to vote on account of race in violation of § 2 of the Voting Rights Act (VRA) of 1965. Plaintiffs also allege that Ordinance 122 was enacted and is being maintained with the discriminatory purpose of denying or abridging the right of Indians to vote on account of race or color or membership in a language minority in violation of plaintiffs' rights guaranteed by § 2 of the VRA, as amended, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States. After considering the evidence admitted during an eleven-day court trial, the court determines by a preponderance of the evidence the following facts and conclusions of law.

I. Parties

Plaintiffs Pearl Cottier and Rebecca Three Stars are Indians, qualified electors, members of the Oglala Sioux Tribe, and residents of Martin, South Dakota. T. I p. 238. T. III pp. 576, 578. Ex. 180 p. 7.

Defendant City of Martin is a municipality located in southwestern South Dakota. Id. Defendants Todd Alexander, Rod Anderson, Scott Larson, Don Moore, Brad Otte, and Molly Risse are City of Martin council members. Don Moore has since been replaced by Ellis Ray Hicks. T. VII, p. 1458. Defendant Janet Speidel is the former City of Martin Finance Officer. She has since been replaced

by Beth Strain. T. X, p. 2112.

II. History of the City of Martin Redistricting

The city of Martin is in Bennett County, which is located in southwestern South Dakota near the Nebraska border. Bennett County is surrounded to the north and west by the exterior boundaries of the Pine Ridge Indian Reservation and to the east by the Rosebud Reservation. Although Bennett County was part of the Pine Ridge Reservation[1] under the Act of March 2, 1889, it was later opened up for settlement. As a result, only the unextinguished allotted lands in Bennett County are considered "Indian country" within the definition of 18 U.S.C. § 1151. Today, the Oglala Sioux Tribe, based on the Pine Ridge Reservation, extends its services to tribal members living within Bennett County. Two Oglala Sioux tribal council representatives are elected to represent the LaCreek District, which covers a significant portion of Bennett County.

Martin is a small city, which according to the 2000 census had a total population of 1078 persons and a voting-age population of 737 persons. The city

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[1] The Act of March 2, 1889, set apart the Pine Ridge Reservation, encompassing what were later organized as three full counties (Bennett, Washabaugh, and Shannon). United States ex rel. Cook v. Parkinson, 396 F. Supp. 473, 477 (D.S.D.), aff'd, 525 F.2d 120, 124 (8th Cir. 1975). By a subsequent act of Congress, the Pine Ridge Reservation was diminished and parts of Bennett County were opened up for settlement. Id. at 489. Thus, the Pine Ridge Reservation now consists of Shannon County and the area formerly known as Washabaugh County, now known as the portion of Jackson County that lies south of the White River.

covers an area slightly greater than one-half square mile. The Indian population in Martin is 485, which is 44.71 percent[2] of the total population and 36 percent of the voting-age population according to the 2000 census.

Historically, the residents of the city of Martin have elected a mayor who ran at-large for a two-year term on a non-partisan ballot. In addition, Martin was divided into three wards, which each elected two city council members to staggered two-year terms on a non-partisan ballot. The record is unclear as to when the ward lines were initially drawn, but both parties agree the ward lines had not changed for at least 47 years. By 2001, the wards within the city were not within the requisite variation of population.

The Martin City Council has the power and duty under South Dakota law to redistrict ward boundaries following the decennial federal census. The city contracted with the Black Hills Council of Local Governments (BHCLG) to refigure the wards so as to be in compliance with the one-person-one-vote requirement. BHCLG initially used incorrect population data when drawing the new wards. The city council, unaware of the mistake made by the BHCLG, adopted the resdistricting recommendations submitted by BHCLG in Ordinance 121 on January

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[2] The 2000 Census was the first federal census to allow respondents to identify themselves with more than one racial group. This court will consider all individuals who identify themselves as Native American, including those who identify with more than one group in light of the Supreme Court decision in Georgia v. Ashcroft, 539 U.S. 461,123 S. Ct. 2498, 2507 n.1, 156 L. Ed. 2d 428 (2003).

16, 2002.

Upon publication of the new boundaries in the local newspaper, city residents suspected that the boundaries were flawed and contacted their attorneys for assistance. The attorneys analyzed Ordinance 121 and concluded that the new ward boundaries were severely malapportioned in violation of the one-person-onevote principle of the Fourteenth Amendment and that the wards unlawfully fragmented the Indian population in Martin in violation of Section 2 of the Voting Rights Act. These concerns were communicated to BHCLG by letter dated March 7, 2002, with a copy to Martin's Mayor Kuxhaus. The city council requested BHCLG to redraw the wards to correct the one-person-one-vote problem. A new map was submitted to the city council. On March 12, 2002, plaintiffs' attorneys received a copy of the revised redistricting plan drafted by BHCLG. Plaintiffs believed that this plan did not correct the fragmentation problem, and they communicated that concern to Mayor Kuxhaus in a letter dated March 12, 2002.

The City Council, although aware of plaintiffs' fragmentation concerns, moved ahead with the adoption of the March 8 plan as Ordinance 122. Like its predecessor plan, Ordinance 122 divides the City into three wards, none of which contains an Indian majority. The total population and voting-age population (VAP) figures under Ordinance 122 are summarized as follows:

Ordinance 122 Statistics						
Ward	Total Population	Indian Population	Percent Indian	VAP	Indian VAP	% Indian VAP
1	352	165	46.88%	236	90	38.14%
2	361	177	49.03%	237	86	36.29%
3	365	143	39.18%	264	90	34.09%

Ordinance 122 took effect on May 8, 2002, and is the plan currently in effect in Martin. A map of the adopted ordinance 122 follows as Figure 1.

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Indian voters submitted a petition to have Ordinance 122 referred to the voters as a ballot issue. City Finance Officer Speidel reviewed the petition, determined that the petition did not have enough valid signatures, but waited to notify those submitting the petition of the defect until the deadline for petitioning for ballot initiatives had passed.

Plaintiffs brought suit on April 3, 2002, alleging that Ordinance 121 violated the one-person-one-vote requirement under the Equal Protection Clause of the Fourteenth Amendment. After trial, the court dismissed the complaint as moot. The court found that Ordinance 121 had been repealed by Ordinance 122, which equally redistributed the population into three wards, and that plaintiffs no longer had an interest in an actual ongoing case or controversy. Plaintiffs then moved to supplement or amend their complaint to include the allegations currently pending before the court regarding Ordinance 122. The court granted plaintiffs' motion to supplement their complaint.

III. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended, prohibits the use of any voting practice which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority. 42 U.S.C. §§ 1973(a), 1973b(f)(2); Thornburg v. Gingles, 478 U.S. 30, 44, 106 S. Ct. 2752, 2763, 92 L. Ed. 2d 25 (1986). A violation of § 2 is established "if, based on the totality of the

circumstances, it is shown that . . . [members of a protected minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The voting strength of a politically cohesive minority group can be diluted either "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." Johnson v. De Grandy, 512 U.S. 997, 1007, 114 S. Ct. 2647, 2655, 129 L. Ed. 2d 775 (1994). Both the dispersal of Indians into districts in which they constitute an ineffective minority of voters or the concentration of Indians into districts where they constitute an excessive majority may dilute racial minority voting strength. Voinovich v. Quilter, 507 U.S. 146, 154, 113 S. Ct. 1149, 1155, 122 L. Ed. 2d 500 (1993).

The Supreme Court has established a test to prove vote dilution through the use of multimember districts under § 2 of the Voting Rights Act:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . .Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it–in the absence of special circumstances,

> such as the minority candidate running unopposed–usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 51. Upon satisfying these three factors, the court must then consider the totality of the circumstances "to determine, based upon a searching practical evaluation of the past and present reality whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." Id. at 2781. A violation of § 2 is established "if, based on the totality of the circumstances, it is shown that . . . [members of a protected minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

A. Sufficiently Large and Geographically Compact

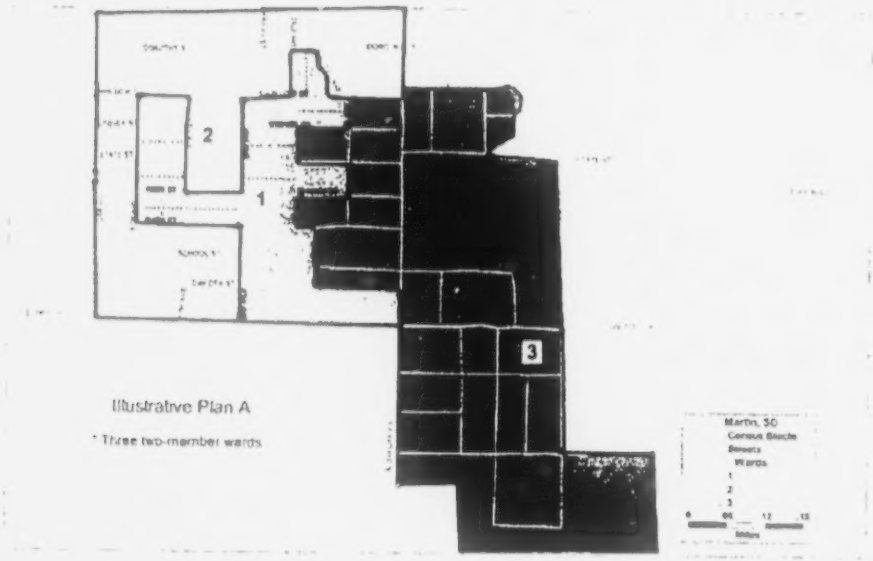
Under the first Gingles factor, plaintiffs must demonstrate that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district. Gingles, 478 U.S. at 50. Small and dispersed minority groups undermine the ability to create a district that would remedy the grievance. Sanchez v. Colorado, 97 F.3d 1303, 1311 (10th Cir. 1996). It considers whether the court can "fashion a permissible remedy in the particular context of the challenged system." Sanchez, 97 F.3d at 1311. When requiring proof of this factor, the

Court noted that:

> [u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. . . . Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure.

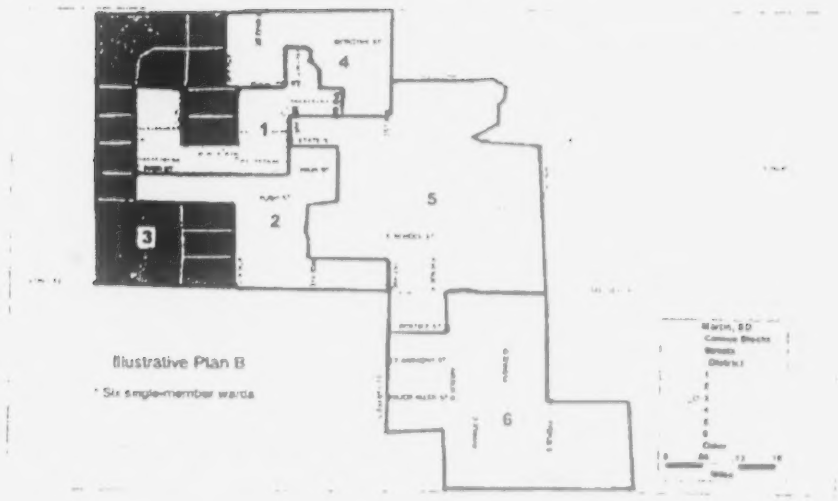
Gingles, 478 U.S. at 50 n.17.

Plaintiffs introduced into evidence three illustrative redistricting plans which were drawn by their demographic expert, William Cooper. Cooper's Plan A and Plan B create at least one additional majority-Indian ward. Ex. 180.



Illustrative Plan A divides the city into three dual-member wards, one of which is a majority Indian ward. Thus, two majority-Indian city council seats based on VAP have been created. The following table summarizes the total population and VAP for Cooper's Illustrative Plan A.

	Population Figure	Percent Dual-Race Indian
Ward 1(VAP)	209	54.55%
(total population)	351	66.95%
Ward 2(VAP)	248	29.03%
(total population)	356	37.64%
Ward 3(VAP)	280	28.21%
(total population)	371	30.46%



Illustrative Plan B divides the city into six single-member wards, two of which are majority-Indian. Thus, a total of two majority-Indian seats based on VAP have been created under Illustrative Plan B. The table summarizes the total population and VAP for Illustrative Plan B.

	Population Figure	Percent Dual-Race Indian
Ward 1(VAP)	114	53.51%
(total population)	180	67.78%
Ward 2(VAP)	110	52.73%
(total population)	187	63.64%
Ward 3(VAP)	124	25.81%
(total population)	173	32.95%
Ward 4(VAP)	119	30.25%

(total population)	180	40.56%
Ward 5(VAP)	128	27.34%
(total population)	181	30.94%
Ward 6(VAP)	142	30.28%
(total population)	177	31.07%

Illustrative Plan C eliminates all ward boundaries and implements an alternative voting system called "limited voting." Under this system, three members of the city council would be elected at-large in each election, and voters would be allowed to case a single vote for their candidate of choice. Under such a system, the threshold of election when three seats are available is 25 percent. See, e.g., Douglas J. Amy, Behind the Ballot Box: A Citizen's Guide to Voting Systems, 125-31 (2000). Thus, the potential for Indians to elect two members of the city council exists under Illustrative Plan C.

Defendants argue that plaintiffs have failed to satisfy the first Gingles factor because any proposed remedy requires an "effective" majority of at least 60 percent Indian VAP if a majority-minority ward were to be created. The court disagrees. First, the law does not definitively require establishing more than a "majority" district. Gingles, 478 U.S. at 50 (requiring proof of a majority); Valdespino v. Alamo Heights Ind. Sch. Dist., 168 F.3d 848, 852-53 (5th Cir. 1999) (requiring proof that the minority group exceeds 50 percent of the relevant population); Solomon v. Liberty County, Fla., 899 F.2d 1012,

1013, 1018 (11th Cir. 1990) (holding that plaintiffs satisfied the first factor of Gingles where minority voters made up 49 percent of the total population, 51 percent of the VAP and 46 percent of the registered voters).

Second, any necessary VAP above a majority is required only at the remedial stage of litigation. Indeed, a 60 percent guideline is a general remedial goal and "is irrelevant to the first part of the Thornburg tripartite threshold test for liability." Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386, 1397 (S.D. Miss. 1992). See also Neal v. Coleburn, 689 F. Supp. 1426, 1438 (E.D. Va. 1988) ("Contrary to defendants' contention, the general 65% guideline for remedial districts is not a required minimum which the plaintiffs must meet before they can be awarded any relief under § 2 of the Voting Rights Act. Rather, the 65% standard is a flexible and practical guideline to consider in fashioning relief for a § 2 violation."). In Dickinson v. Indiana State Election Board, the Seventh Circuit noted that although several cases have recognized a need for a supermajority of minority voters in the proposed district:

> the Supreme Court requires only a simple majority of eligible voters in the single-member district. The court may consider, at the *remedial* stage, what type of remedy is possible based on the factors traditionally examined in single-member districts, such as minority voter registration and turn-out rates. . . . But this difficulty should not impede the judge at the liability

stage of the proceedings.

933 F.2d 497, 503 (7th Cir. 1991) (citations omitted). Because the current case is at the liability stage of the proceedings, the court concludes that proof of a simple majority is all that is required.

Defendants rely on African Americans Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345, 1348 n. 4 (8th Cir. 1995) to support their contention the majority-minority district must have at least 60 percent Indian VAP before minority voters are afforded an effective majority. Villa describes a "safe ward" as a ward in which a minority has a practical opportunity to elect the candidate of its choice and notes that something in the vicinity of 65 percent of the total population or 60 percent VAP are the target percentage. Id. The question before the court in Villa, however, was not whether a 60 percent VAP supermajority was necessary to meet the first Gingles precondition. In fact, in Villa the parties did not dispute that the three Gingles preconditions were satisfied. Rather the dispute centered around whether proportionality had been established and if so, whether proportionality defeated the plaintiffs' § 2 claim despite satisfaction of the three Gingles factors. Id. at 1352. The issue here is not one of proportionality which may be relevant as part of the totality-of-circumstances review, but rather whether the first Gingles precondition has been met, namely whether the minority voters constitute "a majority in a single-member district." Gingles, 478 U.S. at 50 n.17.

Even if Villa did require proof of an effective majority at the first Gingles factor, plaintiffs meet

this requirement. The court in Villa concluded that "either 60% of the voting age population or 65% of the total population is reasonably sufficient to provide black voters with an effective majority." Villa, 54 F.3d at 1348 n.4 (emphasis added). Here, Illustrative Plan A creates a dual-member ward that exceeds 65 percent Indian total population. And Illustrative Plan B creates one single-member ward that exceeds 65 percent Indian total population and a second single-member ward that is close to 65 percent Indian total population. Because Villa does not require proof of both a 60 percent VAP and 65 percent total population, plaintiffs have met their burden of providing at least one illustrative plan with a minority population that constitutes an effective majority in at least one additional single member district.

Defendants also argue that plaintiffs' proposed wards are too fragile to constitute a workable remedy. Defendants rely on the Eighth Circuit opinion in Stabler v. County of Thurston, Neb., 129 F.3d 1015, 1025 (8th Cir. 1997), which found that plaintiffs' proposed plans were too fragile because if four or five Indians moved from the proposed majority-minority districts, and they were replaced by non-Native Americans, the majority-minority composition would be destroyed. Id. Defendants allege that if only ten Indian VAP moved out of Illustrative Map A Ward 1 and were replaced by white VAP, Ward 1's majority-minority status would be destroyed.

In Stabler, plaintiffs were challenging an at-large method of election for the school and village

boards and sought the implementation of either two three-member districts or six single-member districts for the village board and two single-member districts and one three-member district for the school board. The district court found that "the challenged jurisdictions are of such small size that no feasible districting plan can be drawn. The influx of as few as one or two households into or out of a district would disturb the incredibly delicate balance demanded by such a districting scheme." Stabler v. County of Thurston, Nebraska, CIV 93-00394, p. 20 (unpublished opinion).

Unlike Stabler, this court is not faced with a challenged jurisdiction that is so small that no feasible districting plan can be drawn. In fact, Martin has been operating under a three-ward system for over 40 years. And unlike Stabler, it would take more than the influx of one or two households to disturb the balance under the proposed districting scheme. In fact, it would take 60 Indians of the general population (or 10 VAP) to move out of Ward I and be replaced by non-Indians. This is unlikely because based on census data, the net effect of mobility in Martin is that the Indian population is increasing while the non-Indian population is declining. Between 1990 and 2000, the overall population of the city of Martin declined by 24 persons, while the Indian population in Martin increased by 111 persons. Ex. 180, at 11. Thus, the court finds that Plans A and B are neither fragile nor unworkable.

Defendants also argue that plaintiffs did not satisfy the first Gingles factor because they failed to

propose majority-minority districts that are compact. Defendants contend that plaintiffs' proposed districts are irregularly and bizarrely shaped. and that race was a primary concern in drawing the maps. The first Gingles factor does not require "some aesthetic ideal of compactness," but rather looks at whether the minority population is sufficiently compact to constitute a majority in a single-member district. Clark v. Calhoun County, Miss., 21 F.3d 92, 95 (5th Cir. 1994) (Clark I). The constitution does not require regularity of district shape. Bush v. Vera, 517 U.S. 952, 963, 116 S. Ct. 1941, 1953, 135 L. Ed. 2d 248 (1996); Sanchez, 97 F.3d at 1312. "Nor . . . is the decision to create a majority-minority district objectionable in and of itself." Vera, 116 S. Ct. at 1953. The court must determine "whether the affected minority is diffused and thus politically ineffective, not whether the area by which it is bound is geographically dense." Sanchez, 97 F.3d at 1312.

Cooper's Plans A and B follow census blocks, follow marked streets, exhibit more than point contiguity, are of equal population, and recognize the community of interest known as "Snob Hill."[3] Cooper testified that he considered these traditional race-neutral districting principles when designing Plans A and B. These traditional redistricting principles have been recognized by the United States Supreme Court. See, e.g., Miller v. Johnson, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (identifying "respect for political subdivisions or

[3] "Snob Hill" is the popular name for the area in the southeast corner of Martin.

communities defined by actual shared interests" as traditional districting principle); Shaw v. Reno, 509 U.S. 630, 651-52, 113 S. Ct. 2816, 2828-29, 125 L. Ed. 2d 511 (1995) (identifying population equality as a traditional districting principle). Furthermore, no point within a ward in either Plan A or B is more than a mile from the farthest point within that same ward. And similar to the map under Ordinance 122, Plans A and B do not take incumbency protection into consideration. Although the proposed wards in Plans A and B are not as regular in shape as the wards under Ordinance 122, Plans A and B are not so irregular that one could differentiate them from many existing electoral districts throughout the state and nation.

The proposed Plans A and B are not so irregular on their face that they appear to be solely an effort to segregate races for the purposes of voting. The United States Supreme Court has indicated that examples of bizarre shape that would raise concerns include district shapes that look "like a jigsaw puzzle . . . in which it might be impossible to get the pieces apart;" and a district that looks like "a sacred Mayan bird, with its body running eastward . . . [s]pindly legs reach south . . . while the plumed head rises northward . . . an open beak appears to be searching for worms . . .[and] [h]ere and there, ruffled feathers jut out at odd angles." Vera, 116 S. Ct. at 1958-59. Plans A and B do not match these descriptions.

Defendants contend that Plan A appears virtually identical to Cooper's proposed plan found to be a racial gerrymander in Stabler, 129 F.3d at 1025.

In Stabler, the Eighth Circuit found that the "bizarre shape of the proposed districts, considered in combination with the racial and population densities of the proposed districts, support the district court's finding that race was the predominant factor in drawing the proposed districts to create a majority-minority single-member district and that the proposed redistricting resulted in gerrymandered districts." Id. at 1025. Thus, the Eighth Circuit did not rely solely on the shape of the proposed districts to conclude that race was the predominant factor in drawing the proposed districts, which is what defendants are asking this court to do.

The court accepts Cooper's explanation that he applied traditional districting principles. Cooper has been a geographic information system (GIS) consultant for over 15 years. He works primarily on mapping for voting rights legislation, including providing testimony in 24 federal trials and declarations or depositions in an additional 19 cases. He has extensive experience in drawing redistricting maps, having drafted almost 500 using GIS technology and about as many prior to the availability of such technology. Cooper has prepared "thousands and thousands" of maps for almost 500 jurisdictions. He has drawn maps for about 50-75 small jurisdictions (population under a thousand), including one town with a population of 220. He has qualified as an expert witness on the topics of demographics, redistricting, and census data analysis. T. II p. 346-50; Ex. 180 p. 1-3. A review of Plans A and B reveals that the plans follow census blocks, follow marked streets, exhibit more than

point contiguity, create wards of equal population, recognize the community of interest known as "Snob Hill," and create compact and contiguous wards. The court finds Cooper's testimony credible and probative.

Furthermore, plaintiffs need not propose a complete remedy at this stage. See Gingles, 478 U.S. at 50 n.17 (plaintiffs must show that minority voters "possess the *potential* to elect representatives in the absence of the challenged structure or practice") (emphasis added). Plaintiffs' proposed districts must simply demonstrate the feasibility of drawing a majority-minority district and are not cast in stone. Houston v. Lafayette County, Miss., 56 F.3d 606, 611 (5th Cir. 1995). See also Dickinson, 933 F.2d at 503 (completeness of remedy considered at the remedial stage of litigation). "If a § 2 violation is found, the [city] will be given the first opportunity to develop a remedial plan." Id. See also Clark v. Calhoun County, Miss., 88 F.3d 1393, 1407 (5th Cir. 1996) (Clark II) (county's challenge to the remedy was not ripe for review because the county was "free, within limits, to develop a different remedial plan from those proposed by the plaintiffs"); Sanchez, 97 F.3d at 1315 ("drawing the necessary district is not [plaintiffs'] onus because the [city] must be given the first opportunity to fashion a remedy").

Finally, defendants contend that plaintiffs' plans are race based, and that as a result, strict scrutiny applies. The Supreme Court has recognized that "drawing racial distinctions is permissible where a governmental body is pursuing a 'compelling state interest.'" Shaw v. Hunt, 517 U.S. 899, 908,

116 S. Ct. 1894, 1902, 135 L. Ed. 2d 207 (1996) (Shaw II). The Supreme Court has assumed without deciding that compliance with the results test of § 2 of the VRA is a compelling state interest. See Shaw II, 116 S. Ct. at 1905; Miller, 515 U.S. at 920-21, 115 S. Ct. at 2490-91; Vera, 517 U.S. at 977. Justice O'Connor in a separate concurrence found that compliance with VRA in fact is a compelling state interest. Vera, 116 S. Ct. at 1968. A city may then pursue that compelling state interest and create a district that is narrowly tailored to remedy the VRA liability. Id. at 1970. Thus, the consideration of race when proposing a plan does not necessarily invalidate the plan. The court finds as a matter of law that plaintiffs have met their burden of showing that a permissible remedy in the context of the challenged system can be fashioned, which is the first Gingles factor.[4]

B. Minority Political Cohesiveness

The second Gingles factor requires plaintiffs to show that the minority group is politically cohesive. Gingles, 478 U.S. at 51. This ensures that the minority group at issue has distinctive minority group interests. Id. Without such distinct interests,

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[4] Plaintiffs proffer Illustrative Plan C as an alternative which would allow Indians to elect preferred candidates in numbers more proportional to the Indian population. Although Illustrative Plan C's limited voting plan cannot be a racial gerrymander, the court does not believe it has authority to order such a remedy. Cane v. Worcester County, Maryland I and II, 35 F.3d 921 (4thCir. 1994), 59 F.3d 165 (4th Cir. 1995), See also SDCL 9-11-5 9 requiring voters to choose form of government.

unequal opportunity in the political arena cannot harm the minority group. Id. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, . . . and, consequently, establishes minority bloc voting within the context of § 2." Id. at 2769. Voting patterns are the central focus. Campos v. City of Baytown, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988). See also Ruiz v. City of Santa Maria, 160 F.3d 543, 552 (9th Cir. 1998) (candidate who received sufficient votes to be elected if the election were held among the minority group was considered the minority-preferred candidate even if he received less than 50 percent of the minority vote).

Proving this factor typically requires statistical evaluation of elections. Campos, 840 F.2d at 1244-45. "The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." Gingles, 478 U.S. at 57 n.25. Courts have relied on various statistical methods. See, e.g., Houston, 56 F.3d at 611 (use of bivariate ecological regression and extreme case analysis); Clark II, 88 F.3d at 1397 (expert employed regression and homogenous precinct analysis); Sanchez, 97 F.3d at 1317-18 (court considered both ecological and multivariate regression analysis). This court will examine each method used by the experts in this case.

The first method is homogeneous precinct analysis (HPA) or extreme case analysis. This technique examines voting behavior in precincts that

are closest to being racially or ethnically homogeneous in population, typically 90 percent or more. The vote in the most heavily minority precincts is used as an estimate of minority voting behavior and the voting behavior in the most heavily majority precincts is used as an estimate of majority voting behavior. HPA is based directly on voter behavior and requires no statistical inference. Ex. 186 p. 7-8.

A second technique is bivariate ecological regression analysis (BERA). Under this technique, election results are correlated with census data or some other measure of the racial or ethnic composition of the electorate to generate estimates of the voting behavior of majority and minority voters. Ex. 186 p. 5.

A third technique is ecological inference (EI), or the King method. It assumes that the actual votes of two groups for two particular candidates are based on fixed underlying propensities, but vary from precinct to precinct in random ways. It estimates the underlying propensity of each group to turn out for an election and to vote for a particular candidate using the estimation technique of maximum likelihood. Ex. 186, p. 12-13. EI can be used to generate estimates of voting behavior within each ward as well as across all wards in a voting district. See, e.g., Gary King, A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data (1997), pg. 91.

Certain elections are more probative of unequal electoral opportunity than others. Interracial elections are generally more probative than racially homogeneous elections because voters

have a racial choice. See Gingles, 478 U.S. 30 at 80-82 (relying exclusively on interracial legislative contests to determine whether a legislative redistricting plan diluted the black vote); United States v. Blaine County, Mont., 363 F.3d 897, 911 (9th Cir. 2004) (contests between white and Indian candidates are most probative of bloc voting). Endogenous elections, contests within the jurisdiction and for the particular office that is at issue, are more probative than exogenous elections. See Sanchez, 97 F.3d at 1317 (greater weight to endogenous elections). Recent elections are more probative than elections in the distant past. See Uno v. City of Holyoke, 72 F.3d 973, 990 (1st Cir. 1995) (recent elections more probative); Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471, 1482-83 (11th Cir. 1993). When endogenous election data is sparse or unavailable altogether, reliance upon exogenous election data is appropriate. Gingles, 478 U.S. at 57 n. 25 (in the absence of ideal data, "courts must rely on other factors that tend to prove unequal access to the electoral process" and "the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim"). Exogenous elections for offices with comparable levels of importance within the community are entitled to more weight than dissimilar elections. See Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 308 (D. Mass. 2004). Here, the court will give more weight to local county-wide elections than state legislative, statewide or federal elections.

Although interracial elections are highly

probative of minority voting patterns, the court recognizes that the minority preferred candidate is not always a minority. See Lewis v. Alamance County, N.C., 99 F.3d 600, 605-06 (4th Cir. 1996) (minority preferred candidate may be white). Thus, the court will not limit its consideration to interracial elections.

1. Dr. Cole's Analysis

Plaintiffs' expert, Dr. Steven Cole, used HPA, BERA, and EI. Ex. 186 p. 4; 188, p. 8-9; T. III p. 617-18. Dr. Cole also conducted and evaluated exit polls of endogenous elections in the city of Martin. T. III p. 619-20, 667-68. He applied the dual-race method of identifying Indians. Dr. Cole examined federal, state, and county elections from 1996 through 2002. Plaintiffs' counsel provided identification of Indian candidates and voters within the city of Martin. Dr. Cole used countywide election data to estimate the behavior of city of Martin voters using HPA, BERA, and EI. Ex. 186 p.3.

Dr. Cole generated tables to demonstrate his results. In Table 1, Dr. Cole used a regression analysis, which examines the relationship between the ward's racial composition and the candidate's vote share. The R-squared value demonstrates what percentage of the variables in a candidate's vote share can be predicted by race alone. It measures how close the precincts fall to the regression line and estimates Indian cohesion and white crossover voting. T. III p. 623-25; Ex. 186 p. 5. The P-value represents an analysis of variants by testing how well the regression model fits the data. If the P-value is less than .05, it is considered statistically

significant. T. III, p. 641-42; Ex. 186 p. 9-12.

The third column estimates the percentage of Indian voters voting for a candidate and the fourth column estimates the percentage of non-Indian voters voting for that candidate. Dr. Cole used two regression equations adjusted for turnout differences in groups to determine these amounts. The final column is the number of votes received by that candidate, which is obtained from election returns. Ex. 186 p. 28-31.

In Table 2, Dr. Cole employed HPA. For this analysis, he relied on virtually all-white or all-Indian wards, generally over 90 percent. Wards with 90 percent or more non-Indian VAP provide an estimate of white crossover voting while wards with 90 percent of more Indian VAP measure Indian cohesion. T. III, p. 618-19; Ex. 186, p. 7-8. When drawing conclusions about cohesion, Dr. Cole averaged estimates of minority support across elections and relied on the overall pattern of results. Ex. 186, p.24-27. When defining "cohesion," Dr. Cole does not employ a strict numerical threshold. Rather, according to Dr. Cole, he measures political cohesiveness on a "continuum that begins at 51 percent and goes all the way up to 100." T. III p. 647.

Defendants argue that Dr. Cole erroneously finds cohesion if 50.1 percent of the Indian voters vote for the same candidate, noting that cohesion is absent only when two candidates tie. The court disagrees with this characterization of Dr. Cole's testimony. Dr. Cole explained that 50.1 percent represents the very beginning stages of cohesion but would be evidence of very weak cohesion. He

repeatedly indicated that cohesion does not have a specific "cutoff point." T. III p. 696. In Dr. Cole's opinion, polarization exists in contests involving two candidates "when a majority of the voters of one race would elect a different candidate than would the majority of voters of the other race. . . . In head to head contests with more than two candidates, significant racial polarization is exhibited when a majority/plurality of the voters of one race would elect a different candidate than would a majority/plurality of voters of the opposite race." Ex. 186 p. 6.

Dr. Cole did not analyze any endogenous contests for mayor or city council using HPA, BERA or EI. In Dr. Cole's opinion, because only three wards vote in the mayor contest and only one ward votes in each of the three city council contests, regression analysis is precluded. In addition, because none of the three city wards is largely all Indian or all non-Indian, HPA is also precluded. Ex. 186, pg. 11. The court agrees that city of Martin endogenous election data cannot be analyzed in a scientifically valid manner using HPA, BERA or EI. Thus, the court will examine exogenous election data.

Dr. Cole analyzed four interracial, multi-candidate, county-wide, exogenous contests: the 2002 Bennett County school board election (5 candidates vying for 2 seats), 2002 county commissioner democratic primary (6 candidates vying for 3 slots on the general election ballot), 2002 county commissioner general election (9 candidates vying for 3 seats), and the 2000 Bennett County school board election (3 candidates vying for 2 seats). Ex. 186, p.

24, 28, 30-31. Dr. Cole found cohesion amongst Indian voters in all four contests using a BERA analysis. In the 2002 County school board election, Indian political cohesion was 100 percent for Flye and 64 percent for Burritt, both of whom were Indian candidates. In the 2002 county commissioner democratic primary election, Indian political cohesion was 89 percent for Sharp, 70 percent for Bettelyoun, and 69 percent for Ruff, all of whom were Indian candidates. In the 2002 general election contest for county commissioner, Indian political cohesion was 85 percent for Bettelyoun, 86 percent for Sharp (both of whom were Indian candidates), and 53 percent for Hammond. And in the 2000 County School Board contest, Indian political cohesion was 100 percent for Three Stars, an Indian candidate. Thus, the average estimate of Indian political cohesion was 79 percent for interracial, multi-candidate, county races.

Dr. Cole analyzed four interracial, head-to-head, county-wide, exogenous contests: multiple races from the 2002 general election–county sheriff, county register of deeds, and county coroner, and the 2001 election for Bennett County school board. Using EI, Dr. Cole estimated the level of Indian political cohesion for Cummings (an Indian candidate) at 95 percent in the 2002 general election for sheriff; for Sterkel (the non-Indian candidate) at 56 percent in the 2002 general election for county Register of Deeds; for Mesteth (an Indian candidate) at 76 percent in the 2002 general election for county coroner, and for Three Stars (an Indian candidate) at 58 percent in the 2001 county school board election.

Dr. Cole found Indian political cohesion in all four elections under an EI analysis. Thus, the average estimate of Indian political cohesion is 71 percent for interracial, single-candidate, county races.

Three interracial, head-to-head, state exogenous contests were analyzed by Dr. Cole: the 1998 general election for governor,[5] the 2002 democratic primary for governor, and the 2002 general election for attorney general. Using EI, Dr. Cole estimated the level of political cohesion for Hunhoff/Meeks (Meeks is an Indian candidate) at 55 percent in the 1998 general election for governor, for Volesky (an Indian candidate) at 51 percent in the 2002 Democratic primary for governor; and for Volesky (an Indian candidate) at 73 percent in the 2002 general election for Attorney General. Dr. Cole found Indian political cohesion in all three races under an EI analysis. The average estimate of Indian political cohesion is 59 percent for interracial, single-candidate, state races.

Dr. Cole analyzed three general election contests for county-wide office involving only white candidates. Ex. 186, p.25-27, 38-61. In the 2002 general election for county auditor, Dr. Cole estimated the level of political cohesion for Hudson (an Indian-preferred candidate) at 62 percent. In the 2000 general election for county sheriff, Dr. Cole

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[5] Although the race for governor itself was not interracial, this particular election involved an Indian lieutenant governor candidate running on the ticket with the governor. The court finds that the analysis of this contest as interracial was appropriate under these special circumstances.

estimated the level of political cohesion for Duke (the Indian-preferred candidate) at 61 percent. And in the 1998 general election for county auditor, Dr. Cole estimated the level of political cohesion for Williams (the Indian-preferred candidate) at 80 percent. The average estimate of Indian political cohesion for white-white, single-candidate, county offices is 67 percent.

Dr. Cole analyzed 30 general election contests for 32 state or federal offices for the time period of 1996 to 2002 involving only white candidates. Ex. 186 p. 2527, 38-61. Using Dr. Cole's EI analysis, the average level of Indian political cohesion was 82.2 percent for these contests.

Across the 11 exogenous interracial elections (to select 16 candidates) that Dr. Cole analyzed, the average estimate of Indian political cohesion for the top preferred candidates was 73.7 percent. Across the 35 exogenous white-candidate only elections that Dr. Cole analyzed, the average estimate of Indian cohesion for the top preferred candidates was 81.5 percent. All of Dr. Cole's statistical results in every category demonstrate that Indians in the city of Martin are politically cohesive.

In addition to his statistical analysis of exogenous races, Dr. Cole also conducted an exit poll at the combined municipal and school board election held on June 3, 2003. T. III 651:5-10. Two seats on the city council (Ward I and Ward III) and two at-large seats on the school board were on the ballot. To conduct the poll, Dr. Cole hired Indian and non-Indian poll takers from the local college and personally trained them regarding the proper

procedures for conducting a poll. Dr. Cole's poll used a one-page instrument mimicking the ballot with questions added for demographic data. If a voter agreed to participate in the poll, the voter was given a form to complete in confidence. The poll takers attempted to achieve participation by every voter. Out of 293 total voters, of whom 87 were Indian voters as determined by plaintiffs, 114 voters participated in the exit poll for an overall response rate of 40.3 percent. Five responses were not valid, however, reducing the overall participation rate to 38.5 percent. Of the 109 exit poll participants, 68 self-identified themselves as Indian. T. III 664:4-16. Of the 87 Indian voters, 68 (73.2 percent) participated in the exit poll, which Dr. Cole found to be a representative sample. Non-Indian participation in the poll, however, was only (20.9 percent). Because of the low non-Indian participation, Dr. Cole recognized that the poll did not produce a representative sample of non-Indian voters. Dr. Cole had confidence in the estimates of Indian voter preference, but not as much confidence in the estimates of non-Indian voter preference. To compensate for the low non-Indian voter participation, he opted to use an arithmetic technique to estimate maximum non-Indian crossover voting. This technique assumes that the difference in votes between the actual number of votes for a candidate and the number of votes reported by Indian voters in the exit poll were all from non-Indian voters. In Dr. Cole's opinion, because it is unlikely that all remaining votes were from non-Indian voters, this estimate of non-Indian support for an Indian-preferred candidate likely

results in an overestimate of non-Indian crossover voting.

Both city council races were head-to-head, nonpartisan, and not interracial.[6] The Ward I race involved two Indian candidates, where one candidate was the Indian-preferred candidate (Gotheridge), who according to the poll received 100 percent of the Indian vote, and the other Indian candidate (Risse) received 0 percent of the Indian vote. The Indian-preferred candidate received 35 votes, with 19 of those votes coming from Indian voters according to actual polling responses. Dr. Cole found the Ward I contest demonstrated cohesion. Ex. 188, p. 10-11, 15.

In Ward III, the Indian-preferred candidate (Justus) received 85.7 percent of the Indian vote (12 votes out of 14 votes) while the other non-Indian[7]

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[6] Both candidates for Ward I were Indian and both candidates for Ward III were non-Indian.

[7] Defendants argue that Todd Alexander is an Indian candidate. Although Alexander testified during the trial that he considers himself to be an Indian person, under the test articulated by the court in United States v. Driver, 755 F. Supp. 885, 888 (D.S.D. 1991), he would not legally be considered an Indian person. Under the test, tribal enrollment is the most important factor, although the court should also consider whether the individual receives assistance reserved for Indians, enjoys the benefits of tribal affiliation, or lives on the reservation and participates in Indian social life. Id. at 888-89. While Alexander has some Indian blood from a Cherokee great-great-grandmother, he is not enrolled in any tribe. T. VII 1450:20-1451:8. Alexander admitted that he does not receive any benefits usual to tribal affiliation. T. VII p. 1395-96, 1453. And the city of Martin, where Alexander resides, is not located within the exterior boundaries of the Pine Ridge Reservation. While Alexander does attend powwows and memorial services, these public

candidate (Alexander) received 14.3 percent of the Indian vote (2 votes out of 14 votes). Of the 107 Ward III voters, 84 were non-Indian. Dr. Cole found the Ward III contest also demonstrated Indian voter cohesion. Ex. 188, p. 11-12, 16.

Dr. Cole also analyzed the exogenous county school board election in 2003 using exit polling. This contest was interracial and nonpartisan involving six candidates, two of whom were Indian, vying for two seats. The two Indian candidates were the Indian-preferred candidates, receiving 82.7 and 58.8 percent of the Indian vote. Dr. Cole opined the race reflected cohesive Indian voting. Ex. 188, p. 10-11, 14.

The court finds that Dr. Cole qualifies as an expert in this case. He holds a Ph.D. in human experimental psychology. He has taught courses in research methods, computer analysis, scientific data, and psychology. He currently teaches at Emory University and has taught courses at the law school. He served as the director of research for Research Designs Associates, Inc., since 1982. He has worked as a consultant for numerous schools and organizations. He has published numerous papers and has testified about voting behaviors in many cases. T. III p. 614; Ex. 186 Attachment. The court finds that Dr. Cole's education, experience, knowledge, and skill qualify him to testify as an expert in this case.

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events are not sufficient to support a finding that he is an Indian person.

2. Dr. Weber's Analysis

Defendants' expert, Dr. Weber, stated in his supplemental declaration that neither he nor Dr. Cole was able to conduct standard BERA or HPA analysis for endogenous elections held within the three wards of the city of Martin, because of the lack of sufficient variation on the Indian percentage of the VAP across the three wards. Ex. 448, p. 25. Dr. Weber opines that exit poll data "would be the most appropriate data to employ to determine the preferences of Indian and non-Indian voters in the City of Martin." Ex. 449, p.15. Dr. Weber concluded that he was unable to determine registration, turn-out, participation, cohesion, or polarization for the city of Martin. Ex. 448 p. 24-26.

Dr. Weber did analyze Martin city council election history as provided by defendants. Dr Weber opined that since 1981, 27.2 percent of elections have been contested and Indian candidates or white candidates married to Indians have been elected "sometimes." Dr. Weber reported that Ward One has elected two Indian candidates, one in 1984 and one in 2000. Dr. Weber opined that one Indian candidate has won in Wards II and III, but both the candidates ran unopposed. Ex. 448, p. 26-37. Dr. Weber also noted that no Indian candidate has competed for the mayoral elections since 1980, although one non-Indian married to an Indian was appointed and then re-elected without opposition. Ex. 448, p. 38-41. Dr. Weber also opined that no expert could identify the Indian-preferred candidate and, consequently, no expert could demonstrate vote dilution. Ex. 448, p. 42.

Dr. Weber replicated Dr. Cole's statistical analyses presented in his initial and rebuttal reports. In doing so, Dr. Weber identified that Dr. Cole used the wrong VAP data in his estimates, but that this did not significantly affect the analyses.[8] Dr. Weber identified seven interracial, exogenous contests: the 1998 general election for governor, the 2001 school board election, the 2002 democratic primary for governor, the 2002 general election for attorney general, the 2002 general election for sheriff, the 2002 general election for register of deeds, and the 2002 general election for coroner. Ex. 450, Table 3. Under Dr. Weber's EI analysis, the average estimate of Indian political cohesion in the seven interracial elections is 70.6 percent.

Dr. Weber then analyzed 28 elections for county, state, and federal office involving only white candidates. Under Dr. Weber's EI analysis, the average estimate of Indian political cohesion in these 28 white candidate only elections is 88.2 percent. Dr. Weber's EI analysis of both interracial and white-only contests supports a conclusion that Indian's are politically cohesive in the city of Martin.

The court finds that Dr. Weber qualifies as an expert. Dr. Weber has a doctorate in political science and has taught in that field for 36 years. He currently teaches at the University of Wisconsin

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[8] Dr. Weber stated that it is clear that wards outside Martin are driving all of Dr. Cole's assumptions regarding the city of Martin because when Dr. Weber removed the city of Martin wards from his analysis of Table 1, the slope of the regression line is unchanged. Ex. 449 p. 3-15.

where he was asked to fill an endowed faculty position. He has published numerous articles and was the editor of several political science journals. Dr. Weber has testified in several trials on the issue of voting rights. Ex. 451; T.V p. 956-974. The court finds that Dr. Weber's education, experience, knowledge, and skill qualify him as an expert in this case.

3. Reliability of Each Method

In Sanchez, the court evaluated both experts' analyses and results to determine which reached the most reliable results. 97 F.3d at 1316-1319. The court is not obliged to accept any parties' statistical evidence. Clark I, 21 F.3d at 96.

Dr. Cole employs four techniques: HPA, BERA, EI, and exit polling. Numerous courts, including the United States Supreme Court, have accepted HPA and BERA methods as reliable in § 2 cases. See Gingles, 478 at 52-53 (relying on single regression analysis, which the Court considered "standard in the literature for the analysis of racially polarized voting"). See, e.g., Old Person v. Cooney, 230 F.3d 1113, 1123 (9th Cir. 2000) (relying on BERA); Rural West Tennessee African-American Affairs Council v. Sundquist, 209 F.3d 835, 839 (6th Cir. 2000) (considering Dr. Cole's BERA and HPA); Harvell v. Blytheville Sch. Dist. No. 5, 71 F.3d 1382, 1386 (8th Cir. 1995) (relying on regression analysis). The prevalence of both district and circuit courts relying on these methods demonstrates the wide acceptance of these analyses. See Teague v. Attala County, Miss., 92 F.3d 283, 290 (5th Cir. 1996)

(district court erred by disregarding the "established acceptance of regression analysis as a standard method for analyzing racially polarized voting"). Other courts have found that discounting this statistical analysis amounts to reversible error. In Sanchez, the Tenth Circuit reversed the district court for rejecting plaintiffs' BERA and HPA. 97 F.3d at 1321. The Fifth Circuit also required the district court to consider this method and noted that the Supreme Court used this analysis. Teague, 92 F.3d at 291. See also Houston, 56 F.3d at 606. Precedent, therefore, supports the acceptance of Dr. Cole's and Dr. Weber's analyses.

With regard to EI, the method employed by Dr. Cole and Dr. Weber, the court finds that EI is also a reliable method of analysis. Courts recently have recognized EI as a reliable improvement on ecological regression analysis. Rodriguez v. Pataki, 308 F. Supp. 2d 346, 387-88) (S.D.N.Y. 2004) (citing Georgia v. Ashcroft, 195 F. Supp. 2d 25, 69 (D.D.C. 2002), vacated on other grounds, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003)) (recognizing King's ecological inference as having the "prospect of improving on ecological regression" despite its recency in voting rights litigation); United States v. Alamosa County, Colo., 306 F. Supp. 2d 1016, 1023 (D. Colo. 2004) (noting use of King's EI by experts Weber and Engstrom). Dr. Weber admits that EI is being used by experts today. T. V, p. 1029.

Defendants contend that Dr. Cole improperly used EI to generate precinct level data from countywide data. Defendants contend that in Stabler, 129 F.3d at 1025, the Eighth Circuit rejected

such evidence. The Eighth Circuit, however, actually found that the district court did not err in rejecting plaintiffs' proffer of evidence of county-wide voting behavior to prove voter cohesiveness and bloc voting in the School Board and the Village Board elections. Id. The district court found that "the parties were unable to perform regression or homogenous precinct analysis on either School Board or Village Board elections. And while the analysis of county-wide exogenous elections was probative of the claims against Thurston County, the Court has serious reservations about drawing conclusions about racial voting behavior in the school district and Walthill from this analysis." Stabler, CV93-00394, p. 21. At the time Stabler was decided, the EI statistical method had not been developed by Dr. King. The EI method produces valid estimates of voting behavior at the precinct level, and Dr. Cole's figures are estimates of voting in the city of Martin wards only, not the county as a whole. Dr. Richard Engstrom explained that Dr. Cole's use of EI to extrapolate city voting behavior based partially on county-wide data was "something that [EI] allows you to do." T. VII, p. 1279, 1280-82. The court finds the estimates of city voting behavior at the ward level extrapolated partially from county-wide data analyzed under EI is a generally accepted method within the scientific community.

Defendants also question Dr. Cole's expertise in the use of EI because he has previously testified that he was not an expert in EI. While Dr. Cole admits that he did not derive the equations for EI, he testified that he has used EI for some time, he

understands it conceptually, and would be comfortable teaching EI to graduate students. The court finds that Dr. Cole is sufficiently familiar with the application of EI to properly apply it as an expert in this case.

Defendants also allege that the experts used differing definitions of legal terms such as cohesion and polarization, and thus Dr. Cole's analysis should be found invalid. A court can accept numerical calculations of an expert, however, without adopting his legal conclusions regarding polarization. See Askew v. City of Rome, 127 F.3d 1355, 1367 n.2 (11th Cir. 1997) (although court accepted Dr. Cole's numerical estimates, it did not necessarily accept his legal conclusions regarding polarization because the court must base that determination on the relevant law). Proving a pattern of voting behavior does not require complete accuracy in Dr. Cole's numerical estimates. A "pattern will not be fatally altered if a few of his percentages are somewhat inaccurate." Id.

Defendants contend that a finding of cohesion requires that a "significant number" of voters, namely 60 percent or more, vote for the same candidate. In support of this conclusion, defendants rely on Clay v. Board of Education of City of St. Louis, 90 F.3d 1357, 1362 (8th Cir. 1996), aff'g Clay v. Board of Education of City of St. Louis, 896 F. Supp. 929, 935-36 (E.D. Mo. 1995). The court does not need to reach the issue as to whether a finding of cohesion requires an Indian vote of 60 percent or more because the statistical analysis of both Dr. Cole and Dr. Weber exceed this threshold.

With regard to HPA, the court acknowledges

that HPA has some limitations, especially here where no wards in the city of Martin are homogenous. While there are limitations on the conclusions that can be drawn from HPA results regarding voters that are not part of the majority, HPA remains a statistical analysis that is commonly used by other experts in the field as a reliable indicator of how the majority will vote. The court gives the HPA analysis less weight in its considerations, but does note its general consistency with the other data.

The court finds that all three methods employed by the parties' experts in this case generated sufficiently similar results on the issue of Indian cohesion. Even though Dr. Weber, by applying his 60 percent threshold, found cohesion in fewer races than Dr. Cole, the court finds that both experts' analyses demonstrate significant cohesion among Indian voters. In light of the similar estimates and the general acceptance within the scientific community of all three statistical analysis methods, the court accepts the portions of both experts' testimony set forth herein as reliable and probative of cohesion existing among Indians. The court finds that the statistical evidence demonstrates political cohesiveness among Indians.

Plaintiffs also admitted exit poll survey data to demonstrate political cohesiveness. Generally, a properly conducted exit poll survey is the most reliable method for determining racial polarization. Romero v. City of Pomona, 665 F. Supp. 853, 860 (C.D. Cal. 1987). An exit poll permits the court to examine how voters voted and which candidates

were preferred by minority voters. Id. Exit polls, however, are "prone to high nonresponse rates which can seriously bias estimates and distort inferences, because people who do not respond may vote differently than those who do." Aldasoro v. Kennerson, 922 F. Supp. 339, 352 (S.D. Cal. 1995). In addition, exit poll respondents may lie. Id. at 353. A truly representative poll of the votes actually cast should logically demonstrate some consistency between the responses to the poll and the actual returns. Hall v. Holder, 757 F. Supp. 1560, 1577 (M.D. Ga. 1991).

Here, by Dr. Cole's own admission, the exit poll sample under-represented non-Indians, over-represented Indians, and slightly over-represented females. Ex. 188, pp. 7-8. Thus, it was not a representative sample of voters as a whole. Furthermore, the exit poll fails to demonstrate consistency between the responses to the poll and the actual returns. For example, the results of the exit poll for Ward I show Gotheridge receiving 21 votes and Risse receiving 4 votes, when in fact Risse won the election. The results of the exit poll for Ward III show Alexander receiving 10 votes and Justus receiving 17, when in fact Alexander won the election. And the results of the exit poll for the school board show Dillon receiving 71 votes, Red Bear receiving 50 votes, Knecht receiving 20 votes, and Kocourek receiving 19 votes, when in fact Knecht and Kocourek won the election and Dillon and Red Bear came in fourth and fifth respectively. The high nonresponse rates of non-Indians seriously distorted inferences that could be drawn from the exit poll.

When one compares the preferences expressed in the poll with those actually expressed in the election, it is evident that the poll overemphasized the electoral support received by some candidates and underestimated the support harnessed by other candidates. While Dr. Cole attempted to draw inferences from the poll results and to make adjustments based on the high response rates of Indians, the court finds the exit poll evidence to be inconclusive and unconvincing as to whether voting in the 2003 city and school board elections was racially cohesive or racially polarized. Therefore, the court gives no weight to the exit poll evidence.

Additionally, defendants allege that Dr. Cole's exit polling methods were suspect because some of the poll takers were related to one of the plaintiffs. The court too is troubled by the fact that some of the poll takers were related to one of the plaintiffs; however, defendants offer no actual proof that the poll takers knew for whom the poll was being conducted except that it was for Dr. Cole's firm. Because the court gives no weight to the exit poll evidence, the court does not reach the issue of whether this fact alone is sufficient to disregard the exit poll data.

4. Non-Statistical Evidence of Cohesiveness

The inquiry, however, "does not stop with bare statistics." Whitfield v. Democratic Party of Ark., 890 F.2d 1423, 1428 (8th Cir. 1989). "The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically

cohesive. This testimony would seem to be required if the court is to identify the presence or absence of distinctive minority group interests." Sanchez v. Bond, 875 F.2d 1488, 1494 (10th Cir. 1989). Evidence that "a specified group of voters share common beliefs, ideals, principles, agendas, concerns, and the like such that they generally unite behind or coalesce around particular candidates and issues," demonstrates cohesion. League of United Latin American Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 744 (5th Cir. 1993). See Askew, 127 F.3d at 1377 (both empirical and anecdotal evidence demonstrated cohesion).

Political parties and candidates have courted Indian voters with targeted advertisements and other appeals. Ex. 65, 71. Several Indian-oriented newspapers are circulated in South Dakota, including Indian Country Today, the Lakota Journal, and the Black Hills Peoples' News. These papers cover a wide variety of social, cultural, and political topics, including voting rights, redistricting, and political campaigns. Ex. 65, 71, 80, 84, 88, 91-94, 99-103, 106, 110. Indians have organized a network of tribal colleges with courses that teach traditional tribal arts, language, and culture. T. I, p. 242-43.

The Lakota Nation Invitational basketball tournament brings together Indians from across the state every year to watch and participate in athletic and cultural activities. Ex. 26. Tribes and tribal members from across the state frequently come together at social, political, and economic conferences and seminars. Ex. 24, 27, 31, 34, 38.

Examples of Indian people coming together

regarding common interests include first, the holding of several protest marches to highlight issues of Indian concern, including abuse of Indian rights. T. IV, p. 912-13. Second, the LaCreek Civil Rights Commission, which is a group of Indian people who reside in Bennett County, endorsed candidates and have used print and broadcast media to encourage tribal members to support the slate. Third, Indian people have worked together through their tribal governments on a host of political issues including education, tribal housing, and tribal sovereignty. T. III, p. 552-54; T. VIII, p. 14991501.

Dr. McCool, one of plaintiffs' experts, opined that "there is a strong sense of cohesion and loyalty" within the Indian community. He testified that "[t]here are two distinct political communities in Martin, South Dakota, divided by race, history, and culture." Ex. 185, p. 50. The court accepts this testimony of Dr. McCool as reliable. The court finds that he qualifies as an expert to testify in this case. Dr. McCool has a doctorate degree in political science. He has taught courses at the college level since the late 1970s and currently teaches political science at the University of Utah. He is the director of the American West Center, a unit of the University of Utah that researches issues affecting the West, and he teaches classes about western issues, including classes on American Indians. Dr. McCool has published numerous articles and books about the relationship between American Indians and non-Indians. Some of this research specifically discussed Indian issues and political relationships in South Dakota. He has testified as an expert in

several other cases on the political relationship between Indians and non-Indians in the western United States.

The court finds that Dr. McCool has the education, training, skill, and knowledge necessary to make him a reliable expert. The court also finds that his research and methods were reliable and of the type typically practiced in his field. His extensive publications, peer-reviewed work, and involvement in western issues makes his research credible and reliable. For these reasons and the analysis contained in the court's May 27, 2004 order, the court finds that Dr. McCool satisfies the requirements of Rule 702 and Daubert. Ex. 185; Court Order 5/27/04 (Docket 305).

The court gives little weight, however, to the portions of Dr. McCool's report that relied on interviews of various people living on the Pine Ridge and Rosebud Reservations, including the conclusions he drew from those interviews. When comparing evidence, the court finds that the testimony of witnesses at trial is entitled to more weight than the personal history information acquired by Dr. McCool in unstructured interviews.

Lay evidence also demonstrates Indian cohesiveness with regard to recruitment of candidates, registration of voters, and get-out-the-vote efforts. Indians in Bennett County, in and around Martin, established a grass roots political organization in 2001 called the Lacreek District Civil Rights Committee. Ex. 101, 106, 211; T. VIII, p. 1336. Jesse Clausen, who lives in Bennett County, testified that for several years, certain incidents

occurred that made him feel like local public officials violated his civil rights. Indians felt as though law enforcement, particularly the Bennett County sheriff, unfairly singled them out. A group of people who live within the Lacreek tribal council district of the Oglala Sioux Tribe began meeting to discuss concerns and ideas. Clausen became the spokesperson or chairman of the group. Eventually the Lacreek District Civil Rights Committee was formed and they met with the city council, county commissioners, and the mayor. T. VIII, p. 1502-03. In the Committee's view, neither the sheriff, the city council, nor the mayor took action to remedy the situation.

When elected officials did not adequately respond to Indian concerns about law enforcement, the Committee turned its focus to the political process. The Committee determined that by registering voters and getting people to the polls, they could elect a different sheriff and different representation in the county and city commissions. Ex. 94; TIII, p. 528; TIV, p. 911-12; T. VIII, p. 1496-97, 1502-03. In the spring of 2002, the Committee organized a peaceful march in Martin to protest against the actions of the sheriff's office. Between 500 and 1000 people participated. A second march took place that fall. Ex. 46; T. IV, p. 912-13.

The Committee registered Indian voters and recruited candidates for local offices. It sponsored a slate of candidates in the municipal, school board, and county elections in 2002 and supported those candidates with campaign materials and advertisements in print media and on the local tribal

radio station. The Committee met on a weekly basis, organized a phone tree, and registered voters, often by going door to door. On election day, the Committee transported voters to the polls on election day and set up poll watchers. The Committee compared a list of registered voters with those who had voted at the polls, contacted people who had not yet voted, and brought them to the polls. T. III, p. 529-30, 533-34; T. IV, p. 912; T. VII, p. 1344-45; T. VIII, p. 1502-04; Ex. 65, 71, 92, 148, 211.

The Committee met with some success. In the primary, they unseated three county commissioner incumbents. During the general election, the Committee succeeded in electing the sheriff candidate they supported and in electing one county commissioner. The actions and results of the Committee's efforts were publicized nationally. Ex. 146; T. III, p. 532-33.

The court finds the testimony of Clausen and Craig Dillon, who both described the efforts of the Lacreek District Civil Rights Committee, to be reliable and credible and gives their testimony great weight. The court finds that the actions of the Lacreek District Civil Rights Commission is strong evidence of cohesion among Indians. It demonstrates that a significant portion of Indian voters support the same candidates and are concerned with the same issues.

Defendants point to testimony of internal division among tribal members and between tribes as evidence that Indians are not politically cohesive. Defendants quote Molly Risse, Gwen Ward, Gayle Kocer, and Joyce Wilson to support their contention

that not all Indians are cohesive. T. VIII, p. 1580-81, 1618; T. IX, p. 1801-03; T. X p. 2064-67. The court agrees that there is some division among tribal members and between various tribes on certain issues, particularly in relation to internal tribal matters. Cohesion on inter-tribal matters, however, is not relevant to the current case. Indeed, a § 2 violation does not require proof that all members of the minority think alike. The evidence establishes, moreover, that any division among Indians is far less prominent when applied to external factors affecting the tribes, such as relations with the city, county, state or federal government. The court finds that cohesiveness among Indian people exists, specifically regarding outside influences toward Indians. The law, moreover, has historically recognized Indians as members of "distinct political communities." See Morton v. Mancari, 417 U.S. 535, 554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

5. Partisanship

Defendants maintain that partisanship, rather than race, accounts for Indian voting behaviors. While causation may be relevant to the totality-of-circumstances review, it is not relevant in the inquiry into the three Gingles factors. See Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F.3d 476, 493 (2d Cir. 1999) (holding causation irrelevant to the three Gingles factors); Milwaukee Branch of the N.A.A.C.P. v. Thompson, 116 F.3d 1194, 1199 (7th Cir. 1997) (explanation for the defeat of black-preferred candidates should only be considered in the

totality-ofcircumstances inquiry); Lewis v. Alamance County, 99 F.3d 600, 616 n.12 (4th Cir. 1996) (causation relevant to the totality-of-circumstances inquiry, but not in the Gingles analysis); Uno, 72 F.3d at 983 (totality-of-circumstances inquiry may examine non-racial reasons for voting patterns). Cf. Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994) (en banc). Accordingly, partisanship has no bearing on the Gingles factors.

If partisanship is proper for the court to consider, however, the court finds that the evidence does not support that partisanship explains Indian voting patterns more than race. For example, the slate of candidates supported by the Lacreek District Civil Rights Committee were neither all Indian nor all Democrat. In the 2002 Democratic primary election for Bennett County Commission, Indians favored the three Indian candidates over all three Democratic incumbents by greater than a 4-to-1 margin. Ex. 186 p. 28. In the 1998 general election for U.S. House, Indians favored a non-Indian Republican over his non-Indian Democratic opponent by a margin of almost 2-to-1. Ex. 186, p. 42. And in the 2000 general election for State House District 26, Indians voted for the Independent candidate by a 2-to-1 margin over his closest opponent. Ex. 186, p. 41.

Defendants also argue that in a majority of the races analyzed by Dr. Cole, a greater percentage of Indians voted for Democrats over Republicans than voted for Indians over non-Indians. Defendants contend that this demonstrates that party affiliation best explains Indian voting patterns. The court disagrees. The record in the current case does not

"indisputably prove[ ] that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties." League of United Latin American Citizens, Council 4434 v. Clements, 999 F.2d 831, 850 (5th Cir. 1993). Furthermore, minority voters have a right to an equal opportunity to elect representatives of their choice, whatever the basis for those choices. 42 U.S.C. § 1973(b). In Goosby, the Second Circuit stated, "The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates." 180 F.3d at 495-96. Likewise, the court will not accept defendants' argument that partisan politics explains the Indian preference. The court, therefore, does not adopt defendants' partisanship argument.

After considering the statistical evidence, historical evidence, and current-day lay testimony, the court finds that plaintiffs have shown by a preponderance of the evidence that Indians in Martin are politically cohesive. The court finds that plaintiffs have satisfied the second Gingles factor.

C. Usual Defeat of Indian-Preferred Candidates

The third Gingles factor requires plaintiffs to demonstrate that "the white majority votes sufficiently as a bloc to enable it–in the absence of

special circumstances, such as the minority candidate running unopposed–usually to defeat the minority's preferred candidate." Gingles, 478 U.S. at 51. The presence of racially polarized voting "will ordinarily be the keystone of a vote dilution case." Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5, S.D., 804 F.2d 469, 473 (8th Cir. 1986). Voting along racial lines "deprive[s] minority voters of their preferred representative . . . [and] allows those elected to ignore minority interests without fear of political consequences, leaving the minority effectively unrepresented." Gingles, 478 U.S. at 47 n.14. Unless the minority has substantial difficulty electing representatives of their choice, it is impossible to prove that a challenged electoral mechanism impairs their ability to elect. Id. at 48 n.15.

The Supreme Court adopted the definition of racial polarization as existing "where there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently." Id. at 51 n.21. There is no simple test to determine the existence of legally significant racial bloc voting. Id. at 58. In inquiring into the existence of racially polarized voting, the court should ascertain whether minority group members constitute a politically cohesive unit and whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. Id. at 56. Political cohesiveness can be shown by evidence that a significant number of minority group members usually vote for the same candidates, and by a white

bloc vote that "normally will defeat the combined strength of minority support plus white 'crossover' votes." Id. In order for white bloc voting to be legally significant, however, it had to be high enough to "normally defeat the combined strength of minority support plus white crossover votes." Id. at 56. Gingles, however, "does not require an absolute monolith" in the majority's bloc vote. Sanchez, 97 F.3d at 1319.

The level of white bloc voting sufficient to defeat a minority preferred candidate varies according to a variety of factual circumstances. Thus, no mathematical formula or simple doctrinal test is available to determine whether plaintiffs satisfied the third factor. Id. at 57-58; Ruiz, 160 F.3d at 554. The inquiry therefore focuses on statistical evidence to discern the way voters voted. Gingles, 478 U.S. at 57; Sanchez, 97 F.3d at 1315. "The surest indication of race conscious politics is a pattern of racially polarized voting extending over time." Buckanaga, 804 F.2d at 473.

The third Gingles factor considers not the size of the bloc but considers the bloc's effect on minority voters' ability to fully participate in the political process and to elect their representatives of choice. Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1122 (3d Cir. 1993). When determining whether a pattern of usual defeat exists, the court must conduct "a searching practical evaluation of the past and present reality [with] a functional view of the political process." Gingles, 478 U.S. at 45. In examining the third Gingles factor, the inquiry should center on districts with a "white majority."

Gingles, 478 U.S. at 50. All three of the wards in the city of Martin under Ordinance 122 are white majority.

To ascertain the existence of white bloc voting in a particular contest, the court should determine: (1) the candidate who the Indian voters preferred; and (2) whether whites voted as a bloc to defeat the Indian-preferred candidate. Old Person, 230 F.3d at 1122. In analyzing election contests, certain contests are more probative of bloc voting than others. Endogenous elections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting. See Gingles, 478 U.S. at 80-82; Blaine County, 363 F.3d at 911. The court gives greater weight to the most recent elections because they are more probative. Uno, 72 F.3d at 990; Meek, 985 F.2d at 1482-83.

The only endogenous races examined for the city of Martin involved two city council races in Ward I and Ward III. The Ward I race involved two Indian candidates and the Ward III race involved two non-Indian candidates. The analysis was conducted with exit polling by Dr. Cole. Dr. Weber did not analyze this race, but criticized the results of the exit poll. Dr. Cole found:

ENDOGENOUS CONTESTS				
Contest 2003	non-Indian vote for IPC[9]	Indian vote for IPC	Result	Source
Ward I (Indian only)	33.3% according to exit poll 25% as adjusted	100% exit poll	IPC (Gotheridge) lost	Ex. 188, p. 10-11, Table 2
Ward III (white only)	65.2% according to exit poll 36.7% as adjusted	85.7% exit poll	IPC (Justus) lost	Ex. 188, p. 11-12, Table 3

In Ward I, the Indian (and Indian-preferred) candidate lost to an Indian, but not Indian-preferred, candidate. In Ward III, the Indian-preferred candidate lost. As previously set forth, the court gives no weight to the exit poll. While the election results show that the Indian-preferred candidates lost, this is not sufficient proof of polarization and the court draws no conclusions regarding endogenous contests.

The court next examines election contests between interracial candidates in exogenous races. Exogenous races are less probative than the endogenous races and thus the court gives them less probative value. See Sanchez, 97 F.3d at 1317.

[9] IPC stands for Indian-preferred candidate.

Interracial contests are entitled to more probative weight than homogeneous contests. Gingles, 478 U.S. at 80-82. And the court gives more weight to county-wide elections than state and federal because they are of comparable levels of importance to city elections. See Black Political Task Force, 300 F. Supp. 2d at 308.

The following charts, which are set forth in order of the weight given by the court, summarize the exogenous election data. Dr. Cole examined eight county wide interracial elections using HPA and BERA and four of these same contests using EI. Dr. Weber examined four of those contests using BERA and EI attempting to replicate Dr. Cole's EI findings. Their results are summarized as follows:

EXOGENOUS INTERRACIAL Multi-Candidate County-Wide Offices					
Contest	**Method - Expert**	**non-Indian vote for IPC**	**Indian vote for IPC**	**Result**	**Source**
2002 Non-partisan school board (2 seats)	BERA Cole	Flye 11% Burritt 14%	Flye 100% Burritt 64%	One IPC (Flye) won and one IPC (Burritt) lost	Ex. 186, p. 28
	HPA Cole	Flye 15% Burritt 7%	Flye N/A Burritt N/A		Ex. 186, p. 32
2002 Dem. Prim. county comm'r	BERA Cole	Sharp 3% Bettleyoun 31% Ruff 18%	Sharp 89% Bettleyoun 70% Ruff	3 IPCs won	Ex. 186, p. 26

(3 seats)			69%		
	HPA Cole	Sharp 12% Bettleyoun 20% Ruff 12%	Sharp N/A Bettleyoun N/A Ruff N/A		Ex. 186, p. 132
2002 Gen. election county comm'r (3 seats)	BERA - Cole	Bettleyoun 3% Sharp 0% Hammond 7%	Bettleyoun 86% Sharp 86% Hammond 53%	One IPC (Bettleyoun) won and two IPCs lost	Ex. 186, p. 30
	HPA - Cole	Bettleyoun 2% Sharp 4% Ruff 3%	Bettleyoun N/A Sharp N/A Ruff N/A		Ex. 186, p. 34
2000 nonpartisan school board (2 seats)[10]	BERA Cole	26%	Three Stars 100%	IPC (Three Stars) lost	Ex. 186, p. 31
	HPA Cole	11%	N/A		Ex. 186, p. 35

[10] Next highest candidate only received 27 percent of Indian vote.

EXOGENOUS INTERRACIAL Head-to-Head County-Wide Offices					
Contest	**Method - Expert**	**non-Indian vote for IPC**	**Indian vote for IPC**	**Result**	**Source**
2002 Gen. election sheriff[11]	BERA Cole	14%	99%	IPC (Cummings) won	Ex. 189, p. 2
	HPA Cole	8.9%	N/A		Ex. 189, p. 3
	EI - Cole	20%	94%		Ex. 189, p. 3
	BERA - Weber	14.0%	99.1%		Ex. 449, A-5
	EI Weber	24.9%	91.7%		Ex. 450, Table 3
2002 Gen. election reg. of deeds	BERA Cole	5% Johnson	51% Johnson	Court unable to determine IPC candidate. Sterkel won.	Ex. 186, p. 29
	HPA Cole	10% Johnson	N/A		Ex. 186, p. 33
	EI - Cole	96% Sterkel	56% Sterkel		Ex. 186, p. 36
	BERA - Weber	5.2% Johnson	51.6% Johnson		Ex. 449, p. A-6
	EI Weber	2.5% Johnson	52% Johnson		Ex. 450, Table 3
2002 Gen. election	BERA Cole	0%	92%	IPC (Mestet	Ex. 186, p. 30

[11] Dr. Cole submitted corrected data for the sheriff's race based on an error; however, no change was greater than 1 percent rounded to the nearest percent. Ex. 189, p. 1-5.

				h)	
coroner	HPA Cole	5%	N/A	lost	Ex. 186, p. 34
	EI - Cole	1%	76%		Ex. 186, p. 36, Ex. 450, Table 3
	BERA Weber	0%	93%		Ex. 449, p. A-7
	EI Weber	1.8%	98%		Ex. 450, Table 3
2001 school board nonpartisan	BERA Cole	18%	81%	IPC (Three Stars) lost	Ex. 186, p. 30
	HPA Cole	17%	N/A		Ex. 186, p. 34
	EI - Cole	11%	58%		Ex. 186, p. 36,
	BERA - Weber	18.2%	100%[12]		Ex. 449, p. A-9
	EI Weber	27.1%	30.0%		Ex. 450, Table 3

The court notes that in most cases, Dr. Cole and Dr. Weber are consistent in their opinion of the Indian and non-Indian vote. The court finds that with regard to multi-candidate county-wide interracial elections, the Indian-preferred candidates won six contests and lost three contests. The court finds that

[12] Dr. Weber's weighted estimate for Indian support for Three Stars is 1350 percent. Because actual support cannot exceed 100 percent, the court uses 100 percent. Additional results that exceeded 100 percent are indicated by an "*" in these tables.

with regard to head to-head county-wide interracial elections, the Indian-preferred candidates won one contest and lost two contests. In the fourth contest in this category, which is the 2002 general election for register of deeds, the court finds that the election data is so conflicting that it is difficult to even determine the Indian-preferred candidate. Because the court cannot determine the Indian-preferred candidate, by definition the election is not polarized. Thus, among all interracial county-wide races, in five contests the white voters voted sufficiently as a bloc to defeat the Indian-preferred candidate and the court finds those contests to be racially polarized. In eight contests, the Indian-preferred candidate won and as a result the court finds those eight contests were not racially polarized. The court finds that within the category of interracial county-wide elections, white voters did not vote sufficiently as a bloc to "usually" defeat the Indian-preferred candidate.

The court gives the next greatest weight to interracial, state office elections. Here, Dr. Cole analyzed three elections with BERA, HPA and EI. Dr. Weber analyzed all three elections also applying BERA and EI. They found:

EXOGENOUS INTERRACIAL Head-to-Head State Offices					
Contest	**Method - Expert**	**non-Indian vote for IPC**	**Indian vote for IPC**	**Result**	**Source**
1998 Gen. election	BERA - Cole	25%	74%	IPC (Hunhof	Ex. 186, p. 31

governor	HPA - Cole	18%	N/A	f/ Meeks) lost	Ex. 186, p. 35
	EI - Cole	29%	55%		Ex. 186, p. 37
	BERA - Weber	25.3%	73.7%		Ex. 449, p. A-11
	EI - Weber	34.7%	64.4%		Ex. 450, Table 3
2002 Dem. primary governor	BERA - Cole	10%	60%	IPC (Volesky) lost	Ex. 186, p. 29
	HPA - Cole	32%	N/A		Ex. 186, p. 33
	EI - Cole	10%	51%		Ex. 186, p. 36
	BERA - Weber	10.5%	60.6%		Ex. 449, p. A-3
	EI - Weber	6.4%	55.1%		Ex. 450, Table 3
2002 Gen. election AG	BERA Cole	9%	74%	IPC (Volesky) lost	Ex. 186, p. 29
	HPA - Cole	12%	N/A		Ex. 186, p. 33
	EI - Cole	4%	73%		Ex. 186, p. 36,
	BERA Weber	9.0%	74.9%		Ex. 449, p. A-4
	EI - Weber	8.6%	63.1%		Ex. 450, Table 3

In these races, the Indian-preferred candidate lost 100 percent (3 out of 3 candidacies). The court finds that the white voters voted sufficiently as a bloc to

defeat the Indian-preferred candidate in those contests. The court finds that although all of the data does not support Indian cohesion at the 60 percent level, most races are well over or very close to that level. In most cases, Dr. Cole's and Dr. Weber's numbers are largely consistent. The court finds that within the category of interracial state office elections, white voters did vote sufficiently as a bloc to "usually" defeat the Indian-preferred candidate.

Third, the court next examines election contests between white candidates in county-wide exogenous races. Dr. Cole examined three contests using HPA, BERA and EI. Dr. Weber examined those three contests using BERA and EI. Their results are summarized as follows:

EXOGENOUS WHITE ONLY County-Wide Offices					
Contest	**Method Expert**	**non-Indian vote for IPC**	**Indian vote for IPC**	**Result**	**Source**
2002 Gen. Election County Auditor	Cole - BERA	86% (Williams)	53% (Williams)	Court unable to determine IPC candidate (Williams won)	Ex. 186, p. 40
	Cole - HPA	86% (Williams)	N/A		Ex. 186, p. 48
	Cole - EI	6% (Hudson)	62% (Hudson)		Ex. 186, p. 55
	Weber - BERA	85.5% (Williams)	52.6% (Williams)		Ex. 449, p. D-12
	Weber - EI	6.0% (Hudson)	57.8% (Hudson)		Ex. 450, Table 4

2000 Gen. Election County Sheriff	Cole - BERA	15%	91%	IPC (Duke) lost	Ex. 186, p. 41
	Cole - HPA	16%	N/A		Ex. 186, p. 49
	Cole - EI	15%	61%		Ex. 186, p. 56,
	Weber - BERA	15.5%	90.5%		Ex. 449, p. D-17
	Weber - EI	8%	97.1%		Ex. 450, Table 4
1998 Gen. Election County Auditor	Cole - BERA	78%	71%	IPC (Williams) won	Ex. 186, p. 43
	Cole - EI	79%	80%		Ex. 186, p. 57
	Weber - BERA	78.4%	70.9%		Ex. 449, p. D-26
	Weber - EI	72.1%	91.2%		Ex. 450, Table 4

The court notes that in most cases, Dr. Cole and Dr. Weber are consistent in their opinion of the Indian and non-Indian vote. The court finds that with regard to county-wide white-only elections, the Indian-preferred candidate won one contest and lost one contest. In the third contest in this category, which is the 2002 general election for auditor, the court finds that the election data is so conflicting that it is difficult to even determine the Indian-preferred candidate. Because the court cannot determine the Indian-preferred candidate, by definition the election is not polarized. Thus, among all white-only county-wide races, in one contest the white voters voted sufficiently as a bloc to defeat the Indian-preferred candidate and the court finds this contest to be

racially polarized. In two contests, the Indian-preferred candidate won or an Indian-preferred candidate could not be determined and as a result the court finds these two contests were not racially polarized. The court finds that within this category, white voters did not vote sufficiently as a bloc to "usually" defeat the Indian-preferred candidate.

Fourth, the court next examines election contests between white candidates for state and federal office. Dr. Cole examined 25 contests using HPA, BERA, and EI. Using BERA, he examined four contests for the state house of representatives in which two candidates were elected in each election. Dr. Weber examined the initial 25 contests using BERA and EI. Their results are summarized as follows:

EXOGENOUS WHITE ONLY State and Federal Offices					
Contest	**Method Expert**	**non-Indian vote for IPC**	**Indian vote for IPC**	**Result**	**Source**
2002 Gen. Election US Senate	Cole - BERA	24%	94%	IPC (Johnson) won	Ex. 186, p. 38
	Cole - HPA	18%	N/A		Ex. 186, p. 46
	Cole - EI	29%	95%		Ex. 186, p. 54
	Weber - BERA	24.6%	94.3%		Ex. 449, p. D-1
	Weber - EI	35.7%	93.1%		Ex. 450, Table 4
2002 Gen.	Cole - BERA	26%	91%	IPC (Herset	Ex. 186, p. 38

Election US House	Cole - HPA	19%	N/A	h) won	Ex. 186, p. 46
	Cole - EI	30%	91%		Ex. 186, p. 54
	Weber - BERA	26.0%	91.8%		Ex. 449, p. D-2
	Weber - EI	28.7%	92.5%		Ex. 450, Table 4
2002 Gen. Election Governor	Cole BERA	25%	86%	IPC (Abbott) won	Ex. 186, p. 38
	Cole - HPA	18%	N/A		Ex. 186, p. 46
	Cole - EI	32%	86%		Ex. 186, p. 54
	Weber BERA	25.6%	86.7%		Ex. 449, p. D-3
	Weber - EI	36.6%	88.8%		Ex. 450, Table 4
2002 Gen. Election Secretary of State	Cole BERA	36%	87%	IPC (Looby) won	Ex. 186, p. 38
	Cole - HPA	32%	N/A		Ex. 186, p. 46
	Cole - EI	43%	89%		Ex. 186, p. 54
	Weber BERA	36.2%	87.7%		Ex. 449, p. D-4
	Weber - EI	31.4%	92.9%		Ex. 450, Table 4
2002 Gen.	Cole	36%	76%	IPC	Ex. 186, p.

Election	BERA			(Butler)	39
State Auditor	Cole - HPA	35%	N/A	won	Ex. 186, p. 47
	Cole - EI	39%	92%		Ex. 186, p. 54
	Weber BERA	36.1%	91.3%		Ex. 449, p. D-5
	Weber - EI	35.5%	92.8%		Ex. 450, Table 4
2002 Gen. Election	Cole BERA	26%	95%	IPC (McGregor)	Ex. 186, p. 39
State Treasurer	Cole - HPA	30%	N/A	won	Ex. 186, p. 47
	Cole - EI	29%	98%		Ex. 186, p. 54
	Weber BERA	25.9%	95.8%		Ex. 449, p. D-6
	Weber - EI	23.1%	93.4%		Ex. 450, Table 4
2002 Gen. Election	Cole BERA	24%	90%	IPC (Healy)	Ex. 186, p. 39
Comm'r of S & PL	Cole - HPA	29%	N/A	won	Ex. 186, p. 47
	Cole - EI	28%	92%		Ex. 186, p. 55,
	Weber BERA	24.1%	90.8%		Ex. 449, p. D-7

	Weber - EI	21.5%	95.8%		Ex. 450, Table 4
2002 Gen. Election	Cole BERA	29%	92%	IPC (Nelson) won	Ex. 186, p. 39
PUC 6 yr	Cole - HPA	24%	N/A		Ex. 186, p. 47
	Cole - EI	36%	94%		Ex. 186, p. 55
	Weber BERA	30.0%	92.8%		Ex. 449, p. D-8
	Weber - EI	30.1%	94.6%		Ex. 450, Table 4
2002 Gen. Election	Cole BERA	35%	88%	IPC (Johnson) won	
PUC 4 yr	Cole - HPA	34%	N/A		
	Cole - EI	39%	91%		
	Weber BERA	35.4%	88.9%		
	Weber - EI	33.0%	90.7%		
2002 Gen. Election	Cole BERA	36%	90%	IPC (Reis) won	
State Sen. District 26	Cole - HPA	34%	N/A		
	Cole - EI	39%	82%		
	Weber	35.6%	90.8%		

	BERA				
	Weber - EI	50.6%	60.6%		
2002 Gen. Election State House District 26 (2 seats)	Cole BERA	14%	83%	IPC (Heller) won	
2000 Gen. Election Presiden t	Cole BERA	21%	75%	IPC (Gore) lost	Ex. 186, p. 40
	Cole - HPA	14%	N/A		Ex. 186, p. 48
	Cole - EI	29%	56%		Ex. 186, p. 55
	Weber BERA	21.0%	74.9%		Ex. 449, p. D-13
	Weber - EI	12.1%	88.2%		Ex. 450, Table 4
2000 Gen. Election US House	Cole BERA	15%	62%	IPC (Hohn) lost	Ex. 186, p. 41
	Cole - HPA	13%	N/A		Ex. 186, p. 49
	Cole - EI	8%	58%		Ex. 186, p. 56
	Weber BERA	15.1%	61.7%		Ex. 449, p. D-14
	Weber - EI	10.5%	65.8%		Ex. 450, Table 4
2000	Cole	36%	88%	IPC	Ex. 186,

Gen. Election	BERA			(Laubach)	p. 41
PUC	Cole - HPA	28%	N/A	won	Ex. 186, p. 49
	Cole - EI	41%	75%		Ex. 186, p. 56
	Weber BERA	36.3%	88.0%		Ex. 449, p. D-15
	Weber - EI	30.6%	95.0%		Ex. 450, Table 4
2000 Gen. Election State House Dist. 26 (two seats)	Cole BERA	35%	74%	IPC (Jorgeson) lost (only 1 IPC candidate received 50% or greater)	Ex. 186, p.41
1998 Gen. Election US Senate	Cole BERA	57%	100%	IPC (Daschle) won	Ex. 186, p. 42
	Cole - HPA	46%	N/A		Ex. 186, p. 50
	Cole - EI	65%	82%		Ex. 186, p. 56
	Weber BERA	56.7%	100%		Ex. 449, p. D-18
	Weber -	51.6%	95.6%		Ex. 450,

	EI				Table 4
1998 Gen. Election US House	Cole BERA	80%	61%	IPC (Thune) won	Ex. 186, p. 42
	Cole - HPA	82%	N/A		Ex. 186, p. 50
	Cole - EI	77%	71%		Ex. 186, p. 56
	Weber BERA	79.6%	61.7%		Ex. 449, p. D-19
	Weber - EI	86.3%	27.5%		Ex. 450, Table 4
1998 Gen. Election Secretary of State	Cole BERA	25%	77%	IPC (Green) lost	Ex. 186, p. 42
	Cole - HPA	17%	N/A		Ex. 186, p. 50
	Cole - EI	25%	53%		Ex. 186, p. 56
	Weber BERA	24.7%	77.6%		Ex. 449, p. D-20
	Weber - EI	13.0%	93.9%		Ex. 450, Table 4
1998 Gen. Election State Treasurer	Cole BERA	43%	88%	IPC (Butler) lost	Ex. 186, p. 42
	Cole - HPA	36%	N/A		Ex. 186, p. 50
	Cole - EI	36%	65%		Ex. 186, p. 57
	Weber	42.6%	77.9%		Ex. 449, p.

	BERA				D-21
	Weber - EI	35.6%	90.9%		Ex. 450, Table 4
1998 Gen. Election Comm'r of S & PL	Cole BERA	41%	63%	IPC (Johnson) lost	Ex. 186, p. 42
	Cole - HPA	34%	N/A		Ex. 186, p. 50
	Cole - EI	30%	78%		Ex. 186, p. 57
	Weber BERA	41.3%	62.8%		Ex. 449, p. D-22
	Weber - EI	30.6%	85.5%		Ex. 450, Table 4
1998 Gen. Election PUC	Cole BERA	47%	87%	IPC (Burg) won	Ex. 186, p. 43
	Cole - HPA	42%	N/A		Ex. 186, p. 51
	Cole - EI	40%	85%		Ex. 186, p. 57
	Weber BERA	46.8%	87%		Ex. 449, p. D-23
	Weber - EI	36.1%	98.8%		Ex. 450, Table 4
1998 Gen. Election State Senate Dist. 26	Cole BERA	27%	100%	IPC (Kindle) lost	Ex. 186, p. 43
	Cole - HPA	37%	N/A		Ex. 186, p. 51
	Cole - EI	30%	57%		Ex. 186,

					p. 57
	Weber BERA	27.0%	100%		Ex. 449, p. D-24
	Weber - EI	34.7%	94.8%		Ex. 450, Table 4
1998 Gen. Election State House Dist. 26 (two seats)	Cole BERA	31% Bartlett 45% Jorgensen	95% Bartlett 57% Jorgensen	IPC (Bartlett) and Jorgensen lost	Ex. 186, p. 43
1996 Gen. Election President	Cole BERA	23%	100%*	IPC (Clinton) lost	Ex. 186, p. 44
	Cole - HPA	26%	N/A		Ex. 186, p. 52
	Cole - EI	24%	82%		Ex. 186, p. 57
	Weber BERA	23.0%	100%*		Ex. 449, p. D-27
	Weber - EI	39.5%	97.5%		Ex. 450, Table 4
1996 Gen. Election US Senate	Cole BERA	31%	100%	IPC (Johnson) lost	Ex. 186, p. 44
	Cole - HPA	30%	N/A		Ex. 186, p. 52
	Cole - EI	30%	79%		Ex. 186,

					p. 58,
	Weber BERA	31.4%	100%*		Ex. 449, p. D-28
	Weber - EI	32.3%	97.4%		Ex. 450, Table 4
1996 Gen. Election US House	Cole BERA	20%	98%	IPC (Weiland) lost	Ex. 186, p. 44
	Cole - HPA	21%	N/A		Ex. 186, p. 52
	Cole - EI	14%	83%		Ex. 186, p. 58
	Weber BERA	19.9%	100%*		Ex. 449, p. D-29
	Weber - EI	28.7%	89.3%		Ex. 450, Table 4
1996 Gen. Election PUC	Cole BERA	23%	82%	IPC (Nelson) lost	Ex. 186, p. 44
	Cole - HPA	23%	N/A		Ex. 186, p. 52
	Cole - EI	22%	62%		Ex. 186, p. 58
	Weber BERA	23.1%	82.4%		Ex. 449, p. D-30
	Weber - EI	30.3%	69.5%		Ex. 450, Table 4
1996 Gen. Election State	Cole BERA	53%	100%	IPC (Nelson) won	Ex. 186, p. 45
	Cole -	66%	N/A		Ex. 186,

Senate Dist. 26	HPA				p. 53
	Cole - EI	54%	86%		Ex. 186, p. 58,
	Weber BERA	52.4%	100%*		Ex. 449, p. D-31
	Weber - EI	60.8%	93.8%		Ex. 450, Table 4
1996 Gen. Election State House Dist. 26 (two seats)	Cole BERA	Good 56% Risseeuw 10%	Good 82% Risseeuw 81%	IPC (Good) won and IPC (Risseeuw) lost	Ex. 186, p. 45

The court notes that in most cases, Dr. Cole and Dr. Weber are consistent in their opinion of the Indian and non-Indian vote. The court finds that with regard to county-wide white-only elections for state or federal office, the Indian-preferred candidates won 17 contests and lost 14 contests. Thus, in this category, in 14 contests the white voters voted sufficiently as a bloc to defeat the Indian-preferred candidate and the court finds these contests to be racially polarized. In 17 contests, the Indian-preferred candidate won and as a result the court finds these 17 contests were not racially polarized. The court finds that within this category, white voters did not vote sufficiently as a bloc to "usually" defeat the Indian-preferred candidates.

Only in the category of interracial county-wide elections did whites vote sufficiently as a bloc to usually defeat the Indian-preferred candidate. This category is not given the greatest weight, however, and the other categories do not support the proposition that white bloc voting "usually" results in the defeat of the Indian-preferred candidate.

Plaintiffs also offer non-statistical evidence to demonstrate the usual defeat of the Indian-preferred candidate. A number of lay witnesses testified that they could identify the Indian-preferred candidates and that those candidates consistently lost city council elections. T. I, p. 254-57; T. III, p. 530-33; T. IV, p. 845, 869, 873-74, 916-17. Plaintiffs contend that because virtually all the population in Martin is either white or Indian, white bloc voting is the only possible explanation for the defeat of Indian-preferred candidates. None of this testimony eliminates other considerations for candidate losses, including campaign efforts, platform popularity, or candidate characteristics. In light of the overwhelming statistical evidence, this lay testimony is not sufficient to meet plaintiffs' burden of demonstrating the usual defeat of the Indian-preferred candidate.

After considering all the categories of elections and giving the greatest weight to exogenous county-wide interracial elections, the court finds that plaintiffs have not met their burden to prove that the white majority in Martin "votes sufficiently as a bloc to enable it . . . usually to defeat the [Indian] preferred candidate" as is required to prove the third Gingles factor. Gingles, 478 U.S. at 51.

D. Totality of the Circumstances

If a plaintiff satisfies the three Gingles factors, then the court must next consider the totality of the circumstances. Gingles, 478 U.S. at 79. Plaintiffs successfully meet Gingles factors one and two; however, plaintiffs do not meet the third Gingles factor. Because plaintiffs have not satisfied the third Gingles factor, the court need not consider the totality of the circumstances. Clay, 90 F.3d at 1362.

IV. Intent Claim

Plaintiffs allege that Ordinance 122 was adopted and is being maintained for a discriminatory purpose in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments. Supplemented Complaint (Doc. 61). The Eighth Circuit Court of Appeals has held that an "intent" claim requires proof of a discriminatory effect. Villa, 54 F.3d 1345, 1357 n.18. In Villa, after finding against plaintiffs on their § 2 "effects" claim, the court of appeals upheld the district court's grant of summary judgment on plaintiffs' intent claims stating "where there is no discriminatory effect, there is no intent violation." Id. Similarly here, the foregoing analysis rejected plaintiffs' § 2 effects claim. As a result, plaintiffs' intent claims also fail.

Even if the court were to consider plaintiffs' intent claim, the court finds no evidence of discriminatory intent in the passage of Ordinance 122. The United States Supreme Court identified the relevant factors to consider in determining whether intent to discriminate existed in Village of Arlington Heights v. Metropolitan Housing Development, 429

U.S. 252, 266-68, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

> The impact of the official action—whether "it bears more heavily on one race than another," may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . Absent a [stark pattern] . . . impact alone is not determinative, and the Court must look to other evidence.
>
> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. . . .
>
> The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

Id. (citations omitted). Here, the city council adopted a redistricting plan based on a map provided by BHCLG. After a malapportionment problem was identified with the map, BHCLG provided a new map to the city council, which created three wards of nearly equal population. There is no evidence that BHCLG knew the ethnicity of the residents of the city of Martin when they were drafting either map. Upon visual inspection, the wards under Ordinance 122 appear to be compact and regular in shape. There are no contemporary statements by members of the city counsel, minutes of the meetings, or reports that reflect that the council acted with a racially discriminatory intent in the enactment of Ordinance 122.

Although City Finance Officer Janet Speidel's

testimony revealed a lack of truthfulness, she is not a member of the body that passed the city ordinance and there is no evidence attributing her actions to the city council. Although it would have been common courtesy, Speidel had no duty to instruct Fogg, a citizen who circulated petitions to refer Ordinance 122 to a public vote, that his petitions were invalid before the filing deadline. While Speidel's testimony evidenced a departure from the normal sequence of passing and enacting ordinances, that departure is readily explainable by the population error in the first map and the rapidly approaching election necessitating the quick adoption of the second map.

Plaintiffs also contend Speidel's untruthful testimony regarding the city's law enforcement contract with the county provides overall support for their claims of broader discriminatory intent on the part of city officials. While Speidel testified falsely in her affidavit regarding the timing of the city council's plans to withdraw from a contract with the Bennett County sheriff's department, it is undisputed that Sheriff Cummings, a Native American, misused county funds while in office. T. IV, p. 862. Had Cummings' departure from the sheriff's department not involved malfeasance, the court would be more likely to infer that the abrupt change in policy was racially motivated. Because it did involve malfeasance, the court finds that this is not sufficient evidence to support a finding of broader discriminatory intent on the part of city officials.

Accordingly, it is hereby

ORDERED that judgment be entered for

defendants on the issue of vote dilution in violation of § 2 of the Voting Rights Act of 1965; and

IT IS FURTHER ORDERED that judgment be entered for the defendants on plaintiffs' intent claim alleging violations of § 2 of the Voting Rights Act of 1965, the Fourteenth Amendment, and the Fifteenth Amendment of the United States Constitution.

Dated March 22, 2005.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 05-1895

PEARL COTTIER; REBECCA THREE STARS, Appellants, v. CITY OF MARTIN; TODD ALEXANDER, ROD ANDERSON, SCOTT LARSON, DON MOORE, BRAD OTTE, MOLLY RISSE, in their official capacities as members of the Martin City Council; JANET SPEIDEL, in her official capacity as Finance Officer of the City of Martin, Appellees.	*	Appeal from the United States District Court for the District of South Dakota

Submitted: January 9, 2006
Filed: May 5, 2006

Before BYE, HEANEY, and COLLOTON, Circuit Judges.

HEANEY, Circuit Judge.

Martin, South Dakota is a city of 1,078 people located adjacent to the Pine Ridge and Rosebud Indian Reservations. The city is divided into three, dual member wards, each of which elects its two aldermen every two years in staggered terms. Native-Americans make up nearly 45% of the total population and 36% of the voting-age population. Only twice since 1984 has an Indian-preferred candidate been elected alderman. In each case, their election was uncontested.

The American Civil Liberties Union brought an action on behalf of two Native Americans in district court, challenging the 2002, 2003, and 2004 elections. The complaint alleged that the city wards were configured in a manner that intentionally and effectively diluted the voting strength of Native-Americans and kept Indian-preferred aldermen candidates from being elected, contrary to the provisions of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments to the United States Constitution. The district court denied relief, concluding that the white majority did not usually vote in a way to defeat the Indian-preferred candidate. We disagree and remand the matter to the district court to complete the analysis required by the United States Supreme Court pursuant to section 2 of the Voting Rights Act[1] as construed by *Thornberg v. Gingles,* 478 U.S. 30, 49-50, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). If the district court then finds in favor of the plaintiffs, it shall develop a plan under which Native-Americans will have a reasonable opportunity to elect an Indian-preferred candidate.

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[1] 42 U.S.C. § 1973(b).

BACKGROUND

For more than a decade Martin has been the focus of racial tension between Native-Americans and whites. In the mid-1990's, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Justice Department sued and later entered into a consent decree with the local bank requiring an end to "redlining" loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans.

With these conflicts as a background, Martin redrew the city's wards because population shifts had rendered the existing boundaries obsolete. After the new wards were drawn and published as Ordinance 121, attorneys for a Native-American public interest group alleged the new boundaries violated the one-person, one-vote principle, *see Reynolds v. Sims,* 377 U.S. 533, 562-63, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and that the boundaries violated section 2 of the Voting Rights Act.

In March 2002, new districts were drawn to address the one-person, one-vote violation. After review by the South Dakota Attorney General's office, the city council adopted the new ward boundaries

and implemented them under Ordinance 122.[2] After a failed attempt under South Dakota law to refer the ordinance to a voter referendum, *see* South Dakota Codified Laws § 9-20-6, plaintiffs initially brought suit alleging Ordinance 121 violated the Equal Protection Clause of the Fourteenth Amendment. The district court dismissed the complaint as moot because that ordinance had been repealed by Ordinance 122, but the court also granted plaintiff's motion to supplement its complaint to include the allegations currently pending before this court.

In March 2005, the district court entered a final judgment disposing of all of the parties' claims. It found that although the plaintiffs met the first two conditions of *Gingles*, the plaintiffs failed to prove, by a preponderance of the evidence, the third *Gingles* precondition. As a result, the district court concluded the plaintiffs could not prevail in their vote dilution claim. Additionally, the court concluded that, since there was not sufficient evidence to prove a vote-dilution or "effects" claim, the plaintiffs also could not prove that the city of Martin adopted and maintained Ordinance 122 for a discriminatory purpose.

ANALYSIS

"The district court's findings regarding the factual context ... are reviewed for clear error." *Harveli v. Blytheville Sch. Dist.*, 71 F.3d 1382, 1386 (8th Cir.1995) (en banc). Legal conclusions, " 'including

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[2] Ordinance 122 divides Martin into three wards. Although Native-Americans make up approximately 36% of the voting-age population in Martin, each ward created a white super-majority of at least 62%.

those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law,' are subject to [de novo] review." *Id.* (quoting *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred candidates." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. Section 2 of the Voting Rights Act provides that a denial of the right to vote occurs when:

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b).

The Supreme Court in *Gingles* established three preconditions to establishing a section 2 claim:

> 1) that the minority group is large enough and geographically compact enough that it would be a majority in a single-member district; 2) that the minority group is politically cohesive [in

> the sense that its members vote in a similar fashion]; and 3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, [to] usually ... defeat the minority's preferred candidate.

Harvell, 71 F.3d at 1385 (citing *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752). If the three *Gingles* preconditions are met, the court then considers the totality of the circumstances. *Id.* at 1390. Failure to establish all three preconditions defeats a section 2 claim. *Clay v. Bd. of Educ.*, 90 F.3d 1357, 1362 (8th Cir.1996)

The district court found that the plaintiffs met the first two, but failed to meet the third, *Gingles* preconditions. We agree with the district court that the plaintiffs fulfilled the first two preconditions. As to the third precondition, we hold the plaintiffs proved by a preponderance of the evidence that the white majority votes as a bloc to usually defeat Indian-preferred candidates.

To establish the first *Gingles* precondition, a plaintiff must demonstrate a proper and workable remedy exists. *Stabler v. County of Thurston*, 129 F.3d 1015, 1025 (8th Cir.1997). The plaintiffs in this case offered three redistricting plans. The first redistricts Martin into three wards and creates at least one Native-American majority ward. The second redistricts Martin into six wards and creates at least two Native-American majority wards. Both would allow Native-Americans in Martin a more reasonable opportunity to place two representatives on the Martin city council. The third plan eliminates all ward boundaries and implements a system in which three

members of the city council would be elected in each election. According to expert testimony, this would allow Native-Americans a reasonable opportunity to elect at least two representatives to the Martin city council. The district court found that the first two plans presented proper and workable remedies that could be implemented to alleviate the inequalities of the current system, but determined that it lacked the authority to authorize the at-large remedy proposed in the third plan.

Martin disagrees with the district court and argues that the first two plans presented by the plaintiffs are not viable or stable. We agree with the district court. The ultimate viability and effectiveness of a remedy is considered at the remedial stage of litigation and not during analysis of the *Gingles* preconditions. At the initial stage, the plaintiff must only show that "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practices." *Gingles*, 478 U.S. at 50 n. 17, 106 S.Ct. 2752; *see also Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 503 (7th Cir.1991); *Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir.1995). Although Martin argues the plans are not viable or stable, the ultimate end of the first *Gingles* precondition is to prove that a solution is possible, and not necessarily to present the final solution to the problem. *Gingles*, 478 U.S. at 50 n. 17, 106 S.Ct. 2752.

The equal protection clause is violated if race is the predominant factor motivating the placement of a significant number of voters within or without a particular district. *Stabler*, 129 F.3d at 1025 (stating

that bizarrely shaped districts "considered in combination with racial and population densities of the proposed districts, support [a] finding that race was the predominant factor in drawing proposed districts to create a majority-minority single-member district"). As the district court noted, examples of bizarrely shaped districts that should raise concern include those that look like "a sacred Mayan bird, with its body running eastward ... [s]pindly legs reach south ... while the plumed head rises northward ... an open beak appears to be searching for worms." (Appellants' Add. at 19 (quoting *Bush v. Vera*, 517 U.S. 952, 974, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (additional citations omitted)).) "[Section] 2 compactness inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.' " *Abrams v. Johnson*, 521 U.S. 74, 92, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) (quoting *Bush*, 517 U.S. at 977, 116 S.Ct. 1941); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (recognizing "respect for political subdivisions or communities defined by actual shared interests" as a traditional, race-neutral districting principle); *Shaw v. Reno*, 509 U.S. 630, 651-52, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (recognizing population equality as a "sound" districting principle).

In this case, we agree that the shapes of the proposed districts would not draw constitutional scrutiny because the districts are not primarily based on race. The record reflects that the proposed plans follow census blocks, marked streets, exhibited more than point contiguity, created wards of equal popula-

tion, and recognized traditional neighborhoods. Moreover, Martin has maintained a ward system for at least forty years, proving its stability. Furthermore, according to census figures used at trial, it is highly unlikely that a Native-American majority district would fail to maintain its majority over time because the Native-American population in Martin is increasing rather than decreasing.[3] For these reasons, we affirm the district court's finding that the Native-American community in Martin is sufficiently large and geographically compact to constitute a majority in a single-member district.

To satisfy the second *Gingles* precondition, the plaintiff must demonstrate that the minority group is politically cohesive. "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. Evidence of political cohesiveness is shown by minority voting preferences, distinct from the majority, demonstrated in actual elections, and can be established with the same evidence plaintiffs must offer to establish racially polarized voting, because "political cohesiveness is implicit in racially polarized voting." *Sanchez v. Colorado,* 97 F.3d 1303, 1312 (10th Cir.1996).

Proving political cohesiveness requires evaluating elections through statistical and non-statistical evidence. *Cf. Growe v. Emison,* 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) (finding the dis-

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[3] Between 1990 and 2000, the overall population of Martin decreased by 24 people; the Native-American population during that time increased by 111 people.

trict court erred in concluding political cohesiveness was proven where it was unsupported by statistical or anecdotal evidence). The district court relied on three proven approaches to evaluating elections: homogenous precinct analysis, bivariate ecological regression analysis, and ecological inference. *See Rural W. Tenn. African-American Affairs Council v. Sundquist,* 209 F.3d 835, 839 (6th Cir.2000) (considering homogenous precinct analysis and bivariate ecological regression analysis); *Teague v. Attala County,* 92 F.3d 283, 290 (5th Cir.1996) (holding that the district court erred by disregarding "the established acceptance of regression analysis as a standard method for analyzing racially polarized voting").

We agree with the district court that the record is clear that the statistical and non-statistical analysis proved political cohesion within the Native-American community. Statistically, experts from both sides found that the Native-American population on average voted for the same candidates more than 60% of the time. *See African American Voting Rights Legal Def. Fund, Inc. v. Villa,* 54 F.3d 1345, 1353 n. 11 (8th Cir.1995) (noting that "60% majority is merely a guideline, not an absolute threshold," for finding political cohesion). Lay testimony demonstrates that Native-Americans in Martin and the surrounding area were politically cohesive. Examples of cohesion include political protests against the abuse of Native-American rights, the endorsement of a slate of Native-American political candidates, and the use of tribal governments to confront social issues such as education and housing.

Martin argues that if Native-Americans are

politically cohesive, it is because of their political partisanship, and not because of racial identity. Although potentially relevant in the totality of the circumstances analysis, the reason for the cohesion is irrelevant in the threshold determination of whether the *Gingles* preconditions are met. *Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir.1999) (interpreting *Gingles* as treating "causation as irrelevant in the inquiry into three *Gingles* preconditions"); *Lewis v. Alamance County*, 99 F.3d 600, 615 n. 12 (4th Cir.1996) (same). To imply that party affiliation should negate political cohesion would have the effect of denying minority voters an equal opportunity to elect representatives of their choice regardless of the reason. *Goosby*, 180 F.3d at 495-96. For these reasons, we affirm the district court's decision that the Native-American community in Martin is a politically cohesive minority group.

A racial voting bloc "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n. 21, 106 S.Ct. 2752 (internal quotation marks and citations omitted). To be legally significant for the purposes of *Gingles*, the plaintiff must show that "whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Id.* at 56, 106 S.Ct. 2752; *see also Sanchez*, 97 F.3d at 1319. "The correct question is not whether white voters demonstrate an unbending or unalterable hostility to whoever may be the minority group's representative of choice, but whether, as a practical matter, the usual result of the

bloc voting that exists is the defeat of the minority-preferred candidate." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir.1993). "[T]he presence of racially polarized voting will ordinarily be the keystone of a vote dilution case." *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 473 (8th Cir.1986).

To determine whether the white majority voted as a bloc to defeat the Indian-preferred candidate, three inquiries are required. First, who are the minority-preferred candidates?[4] *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir.2000). Second, did the white majority vote "as a bloc to defeat the [minority]-preferred candidate"? *Id.* And third, were there special circumstances, "such as the minority candidate running unopposed," present when minority-preferred candidates won? *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752.

In our view the district court erred in three respects when it determined the white majority usually did not defeat the minority-preferred candidate. First, it did not give sufficient weight to the exit poll of the 2003 elections. Second, it did not give any weight to the results of the 2002, 2003, and 2004 aldermanic elections. Finally, the district court relied exclusively on county, state, and national elections in determining that the evidence failed to prove that Indian-preferred candidates usually lost elections.

First, the district court rejected the exit poll

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[4] The district court was able to define the Indian-preferred candidates, and we rely on its findings of fact to identify the Indian-preferred candidates for this analysis.

results of the 2003 aldermanic races in Wards I and III. In Ward I, the Indian-preferred candidate received an adjusted 25% of the white vote and 100% of the Native-American vote. In Ward III, the Indian-preferred candidate received almost 37% of the white vote and almost 86% of the Native-American vote. The district court rejected these results because it believed the poll failed to ascertain a representative sample of the voters as a whole and because there was inconsistency between the poll results and the actual returns.

In our view, it was clear error to reject these statistics. Although the exit poll probably under-represents white voters and likely over-represents Native-American voters, the results show that despite a cohesive political effort by Native-American voters, their candidates for alderman were defeated. We find this, at the very least, probative. *See Johnson v. De Grandy*, 512 U.S. 997, 1011-12, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Jenkins,* 4 F.3d at 1126 (holding that the third *Gingles* factor "may be satisfied with a variety of evidence, including lay testimony or statistical analysis of voting patterns"). Because the record reflects that Native-Americans and whites are, by and large, the only racial groups in Martin, the only conceivable explanation for the results of the exit poll and the final election tallies is that the white majority voted as a bloc against Indian-preferred candidates. *See Buckanaga,* 804 F.2d at 473 (stating that "[t]he surest indication of race conscious politics is a pattern of racially polarized voting extending over time"); *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir.1987) (holding that

racially polarized voting patterns can establish "both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates").

Second, the district court ignored the results of the 2002, 2003, and 2004 aldermanic elections. The record clearly reflects that in 2002, the Indian-preferred candidates for alderman in each of the three wards lost. In 2003, the Indian-preferred candidates for alderman in Wards I and III lost. And in 2004, the Indian-preferred candidates for alderman in each of the wards lost.

The district court clearly erred when it ignored these election results. The plaintiffs presented eight aldermanic elections over the span of three years that established a sufficient pattern of defeat for Indian-preferred candidates in Martin's aldermanic elections. *See Gingles,* 478 U.S. at 58-59, 80-82, 106 S.Ct. 2752 (finding data from three election years, involving minority candidates, sufficient to uphold district court's vote-dilution ruling); *Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496, 502-03 (5th Cir.1987), *cert. denied,* 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989) (stating that "*Gingles* ... suggests flexibility in the face of sparse data"). Importantly, it is these elections-the Martin aldermanic elections-that are at the center of this litigation. *Clark v. Calhoun County,* 88 F.3d 1393, 1397 (5th Cir.1996) (holding that virtual absence of electoral success in relevant district has the greatest impact on the evaluation of vote-dilution claims). In short, the absence of Native-American aldermen, combined with evidence of racially polarized voting, provides

striking proof of vote dilution in Martin.

Third, the district court found that the results of county, state, and national elections supported the view that Indian-preferred candidates did not usually lose elections in Martin. At the national level, the district court factored in the 1998 and 2002 races for United States Senate and House of Representatives as indications that Indian-preferred candidates were able to win elections. At the state level, victories by the Indian-preferred candidate in the 2002 elections for state senate district 26, state house district 26, state auditor, state secretary of state, and state treasurer were considered as part of the analysis of the third *Gingles* precondition. The district court also used county elections such as the 2002 races for county commissioner, sheriff, and school board as examples of Indian-preferred candidates who won elections. The court held these elections were evidence that the Indian-preferred candidates did not usually lose their elections in spite of the white majority bloc.

In our view, these elections provide very little evidence of whether Martin's ward system allows Native-Americans to elect their preferred candidates. Although it can be appropriate to factor in exogenous elections,[5] these elections are meant to supplement, not replace, endogenous elections. *See Clay,* 90 F.3d at 1362. The data gained from state and national elections did little to reveal whether there was racial polarization within the city of Martin's ward system.

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[5] Exogenous elections are elections that are outside of the district at issue. Endogenous elections are elections that involve the district at issue.

For example, citing Tom Daschle's 1998 victory in the United States Senate race may prove the relevance of the Native-American vote throughout the state, but Daschle's victory fails to reveal whether Martin's ward system allows Native-American residents to elect their preferred candidates to alderman. *Accord Westwego Citizens for Better Gov't v. City of Westwego,* 872 F.2d 1201, 1209 n. 11 (5th Cir.1989) (stating that "evidence derived from exogenous elections ... must be evaluated according to its probative value"). Because of their far-reaching scope, state and national elections offered little probative insight into whether Martin's ward system violated section 2 of the Voting Rights Act. The same can be said for election results from Bennett County, where Martin is located. Indian-preferred candidates fare better in the county simply because Native-Americans make up 49.25 percent of the county's voting-age population while whites make up 49.65 percent of the county's voting age population. *See id.* at 1209-10 (focusing its analysis on the exogenous data from the precincts of the jurisdiction directly at issue).[6]

Considering the entirety of evidence presented in this case, we hold that the plaintiffs proved by a preponderance of the evidence that the white major-

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[6] Plaintiffs also appealed the district court's adverse finding on the claim that Ordinance 122 was adopted and maintained for a discriminatory purpose in violation of the Voting Rights Act. We do not address whether a discriminatory intent claim requires proof of discriminatory effect. Instead, for the reasons set forth by the district court, we agree that the evidence is not sufficient to support a finding that Ordinance 122 was adopted and maintained for a discriminatory purpose.

ity usually defeated the Indian-preferred candidate in Martin aldermanic elections. First, the 2003 exit poll clearly showed racial polarization. *See De Grandy,* 512 U.S. at 1011, 114 S.Ct. 2647 (recognizing that the "ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts"); *Harvell,* 71 F.3d at 1386 (considering statistical analysis, exit polling, and lay testimony). Although Native-Americans predominantly voted for the Indian-preferred candidates, those candidates lost when the actual votes were counted. Because Native-Americans and whites make up more than 99% of Martin's population, the only conclusion available is that whites voted as a bloc to defeat the Indian-preferred candidates. *See Buckanaga,* 804 F.2d at 473.

Secondly, whereas the district court did not give the aldermanic election results of 2002 through 2004 probative value, we consider these elections central to the analysis of whether there was a section 2 violation. The plaintiffs proved the third *Gingles* precondition in part because the aldermanic election results of 2002 through 2004 reveal the Indian-preferred candidates for alderman always lost these elections. *See Gingles,* 478 U.S. at 58-59, 80-82, 106 S.Ct. 2752; *Jenkins,* 4 F.3d 1103, 1123 (recognizing the most important aspect of the analysis is to determine whether the white voting bloc usually results in the defeat of the minority-preferred candidate). Finally, county, state, and national election results were not probative in determining whether Martin's ward system denied Native-Americans a

reasonable opportunity to elect their preferred candidates.

CONCLUSION

For each of the reasons noted herein, we reverse the decision of the district court and find that the plaintiffs met, by a preponderance of the evidence, all three *Gingles* preconditions. Thus, we remand the matter to the district court with instructions to initially determine whether, in view of the fact that plaintiffs have met all three *Gingles* preconditions, the plaintiffs are entitled to relief in light of the totality of the circumstances. The Supreme Court has listed the following factors as relevant in the totality of the circumstances analysis:

> (1) the history of voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the state or subdivision is racially polarized; (3) the extent to which the state or subdivision has used voting practices or procedures that tend to enhance opportunities for discrimination against the minority group; (4) whether minority candidates have been denied access to any candidate-slating process; (5) the extent to which minorities have borne the effects of past discrimination in relation to education, employment, and health; (6) whether local political campaigns have used overt or subtle racial appeals; (7) the extent to which minority group members have been elected to public office in the jurisdiction; (8)

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the minority group; and (9) whether the policy underlying the use of voting qualifications is tenuous.

Harvell, 71 F.3d at 1385-86 (citing *Gingles* 478 U.S. at 36-37, 106 S.Ct. 2752). This court has previously focused the totality of the circumstances analysis on racial polarization and the ability to elect minority-preferred candidates under the challenged scheme. *Id.* at 1390.

Plaintiffs do not need to prove a particular number of the above-listed factors or prove that a majority of them point one way or the other. Rather, "the final determination of whether the voting strength of minority voters is canceled out demands the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case." *Whitfield v. Democratic Party*, 890 F.2d 1423, 1432 (8th Cir.1989) (quoting S.Rep. No. 417, at 29 n. 118) (internal quotations and modifications omitted).

In the event the district court finds that under the totality of the circumstances, the plaintiffs are entitled to relief, the district court shall devise and implement a remedy that will give Native-Americans in Martin a reasonable opportunity to elect Indian-preferred candidates to alderman. In so doing, the defendant shall be given an opportunity to propose a remedy within a specified amount of time. *See Cane*

v. Worcester County, 35 F.3d 921, 927 (4th Cir.1994). The court should then review the proposed order to determine whether it is "legally unacceptable." *Id.* If the defendant fails to propose a legally acceptable remedy, the district court shall devise a plan that ensures that Indian-preferred candidates have a reasonable chance of prevailing in Martin municipal elections for alderman. Among its options, the district court has the discretion to implement any of the three plans presented by the plaintiffs.[7]

COLLOTON, Circuit Judge, dissenting.

The appeal in this case, involving a claim under Section 2 of the Voting Rights Act, focuses on the third precondition for such a claim established in

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[7] We disagree with the district court's finding that it is unable to apply an at large voting system in Martin. In *Cane*, the court considered the amount of deference due to a legislative policy decision underlying proposed electoral schemes. *Cane*, 35 F.3d at 927-28. Even where the legislative body fails to propose a plan or where the plan proposed is legally unacceptable, "the court, in exercising its discretion to fashion a remedy that complies with § 2, must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or legally unacceptable remedy offered by the legislative body." *Id.* at 928. If, at the remedy stage, a redistricting of Martin's wards appears unworkable, it appears that plaintiffs' third plan would be a viable option. Whereas the plan in *Cane* completely eliminated elected positions, plaintiffs' at-large plan continues Martin's practice of staggering its aldermanic elections and maintains the current number of aldermen. Moreover, its current form of aldermanic government is by choice, not by legislative mandate. *See* S.D. Codified Laws §§ 9-11-5; 9-11-6. In essence, an at-large election would change Martin into a single ward rather than three wards. More importantly, an at-large system would conform Martin to the requirements of section 2 of the Voting Rights Act.

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The district court found that the plaintiffs had not established that the white majority in Martin, South Dakota, "votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S.Ct. 2752. Because I do not believe the district court clearly erred in its conclusion that plaintiffs failed to meet their burden, I would affirm the judgment of the district court.

Vote dilution claims are "peculiarly dependent upon the facts of each case," requiring "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752 (internal quotations omitted). To "preserve[ ] the benefit of the trial court's particular familiarity with the indigenous political reality," *id.*, we apply a "clear error" standard of review both to the predicate factual determinations and to the ultimate finding regarding vote dilution. *Id.*; *Abrams v. Johnson*, 521 U.S. 74, 91, 93, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). It is the plaintiffs' burden to demonstrate the existence of vote dilution. *Voinovich v. Quilter*, 507 U.S. 146, 155-56, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993).

On appeal, the plaintiffs urge that the district court improperly relied on exogenous election results from a jurisdiction other than Martin, and the court appears to conclude that the district court improperly relied on statewide and national election results. *Ante*, at 11-12. In the district court, however, the plaintiffs themselves presented and advocated the

use of exogenous election data to estimate the demographics of voting within the city. The district court fully recognized that endogenous elections are more probative than exogenous elections. (Mem. Op. and Order, R. Doc. No. 377, at 24) (hereafter "Order"). But given the conclusion of the plaintiffs' own expert that the small size of the city precluded both regression analysis based only on the city precincts and homogenous precinct analysis, (Appellants' App. at 530), the plaintiffs presented exogenous data in an effort to meet their burden of proof.

Citing the testimony of their expert, Dr. Cole, the plaintiffs argued that "[w]hile endogenous contests are the most probative of racial bloc voting, courts routinely consider voting patterns in exogenous contests on the ground that any election in which residents of a jurisdiction vote tells us something about voting behavior." (Pls.' Post-Trial Proposed Findings of Fact and Conclusions of Law, R. Doc. No. 360, at ¶¶ 243, 374-90). Cole testified that in drawing a conclusion with respect to the third *Gingles* factor, he followed a process similar to that he used for the second *Gingles* factor, in which "you look to the exogenous contests," and "give more weight to exogenous contests that are closer in nature to the city council contests like county level contests as opposed to state and federal contests." (T. Tr. III at 647-49).

The plaintiffs now disagree with the district court's finding that the evidence did not establish white bloc-voting behavior that usually defeated the Indian-preferred candidate, but I see no legal error in the court's reliance upon the exogenous election sta-

tistics offered by the plaintiffs, and no clear error in the court's factual determinations based on those data. Although the district court did use *data* from state and national elections, the district court did not rely on the state and national *outcomes* in tabulating the wins and losses of Indian-preferred candidates. *Cf. ante* at 11-12. Rather, the district court relied on the precinct-level results for those elections, which were reported by Dr. Cole and cited by the plaintiffs as the election results for the city of Martin. For example, the court tallied the 1996 presidential election as a "loss" for the Indian-preferred candidate, because that candidate-President Clinton-"lost" in the precincts from the City of Martin, even though he won the office of President in the national election. (Order at 72; Appellants' App. at 576). The court did, in a few instances, rely on *county* election results, (Order at 55-56), but this was consistent with the plaintiffs' position that exogenous data of this type should be used to supplement endogenous data. (R. Doc. No. 360, at ¶¶ 243; T. Tr. III at 647-49).

The hypothetical city results derived from exogenous elections do not demonstrate that the district court's overall finding as to the third *Gingles* factor was clearly erroneous. The numbers of interracial elections presented to the district court were very small. There were only four head-to-head interracial countywide races; one race was non-polarized, and the non-Indian-preferred candidate won the other three in the city. (Order at 57-58; Appellants' App. at 555-56). There were only three statewide interracial head-to-head races, and the non-Indian-preferred candidate won those in the city. (Order at

60-61; Appellants' App. at 555-56). But there were 25 statewide races with white-only candidates, and the Indian-preferred candidate won 15 of those contests in the city. (Order at 64-73; Appellants' App. at 573-577). There were three "white-only" countywide races; one contest was non-polarized, and the Indian-preferred candidate was victorious in one of the other two in the city. (Order at 62; Appellants' App. at 574-76). The county results that the district court used to supplement the city results showed that Indian-preferred candidates won five of nine interracial multi-candidate races in Bennett County. (Order at 55-56; Appellants' App. at 547, 549, 550). Overall, even according lesser weight to the county results, these data are mixed, and they fall short of demonstrating clear error by the district court in finding an absence of proof that white voters typically vote as a bloc to defeat Indian-preferred candidates.

Beyond these exogenous election results, there was simply a failure of proof by the plaintiffs. The only other statistical evidence presented to the district court was a 2003 exit poll concerning aldermanic elections. The district court gave specific and cogent reasons for its decision to give no weight to this exit poll. It found that the poll "was not a representative sample of voters as a whole" because it under-represented non-Indians, over-represented Indians, and slightly over-represented females. (Order at 41). The court found that the "high nonresponse rates of non-Indians seriously distorted inferences that could be drawn from the exit poll." (Order at 42). These factors were a legitimate cause for concern, because exit polls are " 'prone to high nonresponse

rates which can seriously bias estimates and distort inferences, because people who do not respond may vote differently than those who do.' " (Order at 41 (quoting *Aldasoro v. Kennerson*, 922 F.Supp. 339, 352 (S.D.Cal.1995)). The court further expressed the concern that "exit poll respondents may lie," *id.*, and thus observed that "[a] truly representative poll of the votes actually cast should logically demonstrate some consistency between the responses to the poll and the actual returns." *Id.* In this case, however, the exit poll "fail[ed] to demonstrate consistency between the responses to the poll and the actual returns," thus tending to undermine any inference that the poll was a reliable indicator of voting behavior. (Order at 41-42).[8]

Under these circumstances, it was not clear error for the court to decline to view the poll as reliable evidence of voting behavior by residents of the City of Martin. There were reasonable grounds for the district court to believe that the poll results may understate the number of Indians who prefer the "non-Indian-preferred candidate," understate the number of white voters who prefer the "Indian-preferred candidate," and fail to reflect truthful answers of those who responded.

Nor do I think the district court was required to base its conclusions on the results of the aldermanic elections in 2002, 2003, and 2004, in the city of Martin. There was no statistical evidence regarding

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[8] The court also was "troubled by the fact that some of the poll takers were related to one of the plaintiffs," (Order at 42), but found it unnecessary to determine whether this fact alone was a sufficient basis to disregard the data.

the results of these elections, other than the 2003 exit poll that the district court found unreliable. The only other evidence regarding these elections was the testimony of several lay witnesses who indicated an opinion regarding the Indian-preferred candidates for those elections, and whether those candidates won or lost. This testimony was disputed. Some of these witnesses presented by the plaintiffs did not even live in Martin. (T. Tr. III at 540; T. Tr. IV at 849, 880, 934). The defendants introduced testimony from Indian voters who did reside in Martin, and this evidence tended to show that Indians, in fact, have varied opinions on issues of the day and on preferred candidates for elective office. (T. Tr. VIII at 1580-85, 1620, 1694; T. Tr. IX at 1802; T. Tr. X at 2104). The district court considered the lay testimony, but found that "[i]n light of the overwhelming statistical evidence, this lay testimony is not sufficient to meet plaintiffs' burden of demonstrating the usual defeat of the Indian-preferred candidate." (Order at 74). This is a factual finding that addresses the relative persuasiveness of disputed lay testimony and statistical evidence unfavorable to the plaintiffs, and there is no clear error in the district court's finding.

At bottom, this is not a case in which the district court materially misapplied the relevant law, failed to address the evidence presented by the plaintiffs, or considered facts that were irrelevant. It is a case in which the plaintiffs disagree with the weight the district court gave to the evidence that they presented. The district court has "particular familiarity with the indigenous political reality," *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752, and the record in support

of the plaintiffs' case is not so strong as to generate a "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (internal quotations omitted). I would therefore affirm the judgment of the district court.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

PEARL COTTIER and REBECCA THREE STARS,

Plaintiffs,

vs.

CIV. 02-5021-KES

MEMORANDUM OPINION AND ORDER

CITY OF MARTIN; TODD ALEXANDER, ROD ANDERSON, SCOTT LARSON, DON MOORE, BRAD OTTE, and MOLLY RISSE, in their official capacities as members of the Martin City Council; and JANET SPEIDEL, in her official capacity as Finance Officer of the City of Martin,

Defendants.

Plaintiffs allege that the City of Martin Ordinance 122 dilutes the voting strength of Indians by fragmenting the Indian voters into three wards, which has the result and effect of denying the right of Indians to vote on account of race in violation of § 2 of the Voting Rights Act of 1965(VRA). This is plaintiffs' "result" claim. Plaintiffs also allege that Ordinance 122 was enacted and is being maintained with the discriminatory purpose of denying or abridging

the right of Indians to vote on account of race or color or membership in a language minority in violation of plaintiffs' rights guaranteed by § 2 of the VRA, as amended, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments of the Constitution of the United States. This is plaintiffs' "intent" claim.

FACTUAL BACKGROUND

The City of Martin is in Bennett County, which is located in southwestern South Dakota near the Nebraska border. Bennett County is surrounded to the north and west by the exterior boundaries of the Pine Ridge Indian Reservation and to the east by the Rosebud Reservation.

Martin is a small city, which according to the 2000 census, had a total population of 1078 persons and a voting-age population of 737 persons. The city covers an area slightly greater than one-half square mile. The Indian population in Martin is 485, which is 44.71 percent[1] of the total population and 36 percent of the voting-age population according to the 2000 census.

Historically, the residents of the city of Martin have elected a mayor who ran at-large for a two-year term on a non-partisan ballot. In addition, Martin was divided into three wards, which each elected two

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[1] The 2000 Census was the first federal census to allow respondents to identify themselves with more than one racial group. This court will consider all individuals who identify themselves as Native American, including those who identify with more than one group, in light of the Supreme Court decision in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S.Ct. 2498, 2507 n. 1, 156 L.Ed.2d 428 (2003).

city council members to staggered two-year terms on a non-partisan ballot. The record is unclear as to when the ward lines were initially drawn, but both parties agree the ward lines had not changed for at least 47 years. By 2001, the wards within the city were not within the requisite variation of population.

The Martin City Council has the power and duty under South Dakota law to redistrict ward boundaries following the decennial federal census. The city contracted with the Black Hills Council of Local Governments (BHCLG) to refigure the wards so as to be in compliance with the one-person-one-vote requirement. BHCLG initially used incorrect population data when drawing the new wards. The city council, unaware of the mistake made by BHCLG, adopted the redistricting recommendations submitted by BHCLG in Ordinance 121 on January 16, 2002.

Upon publication of the new boundaries in the local newspaper, plaintiffs suspected that the boundaries were flawed and contacted attorneys for assistance. The attorneys analyzed Ordinance 121 and concluded that the new ward boundaries were severely malapportioned in violation of the one-person-one-vote principle of the Fourteenth Amendment and that the wards unlawfully fragmented the Indian population in Martin in violation of § 2 of the VRA. These concerns were communicated to BHCLG by letter dated March 7, 2002, with a copy to Martin's Mayor Bill Kuxhaus. The City Council requested BHCLG to redraw the wards to correct the one-person-one-vote problem. A new map was submitted to the City Council. On March 12, 2002, plain-

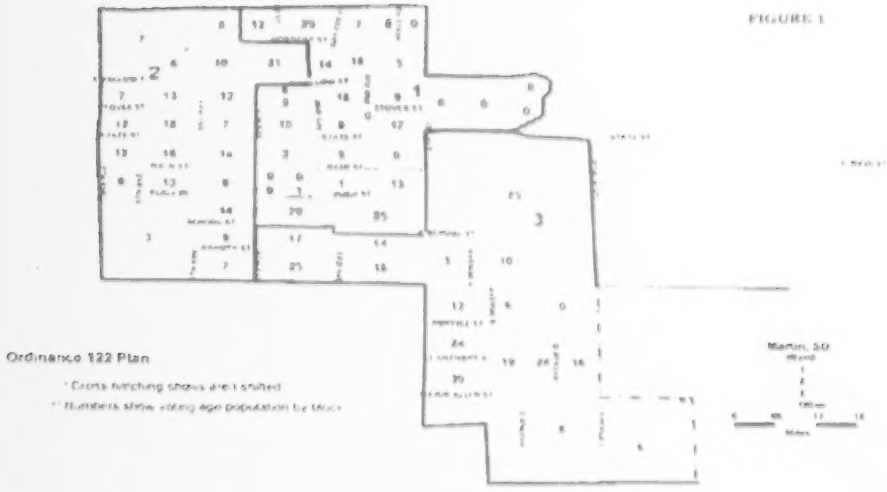
tiffs' attorneys received a copy of the revised redistricting plan drafted by BHCLG. Plaintiffs believed that this plan did not correct the fragmentation problem, and they communicated that concern to Mayor Kuxhaus in a letter dated March 12, 2002.

The City Council, although aware of plaintiffs' fragmentation concerns, moved ahead with the adoption of the March 8 plan as Ordinance 122. Like its predecessor plan, Ordinance 122 divides the City into three wards, none of which contains an Indian majority. The total population and voting-age population (VAP) figures under Ordinance 122 are summarized as follows:

Ordinance 122 Statistics

Ward	Total Population	Indian Population	Percent Indian	VAP	Indian VAP	% Indian VAP
1	352	165	46.88%	236	90	38.14%
2	361	177	49.03%	237	86	36.29%
3	365	143	39.18%	264	90	34.09%

Ordinance 122 took effect on May 8, 2002, and is the plan currently in effect in Martin. A map of the adopted Ordinance 122 follows as Figure 1.



Indian voters submitted a petition to have Ordinance 122 referred to the voters as a ballot issue. City Finance Officer Janet Speidel reviewed the petition and determined that the petition did not have enough valid signatures, but waited to notify those submitting the petition of the defect until the deadline for petitioning for ballot initiatives had passed.

Plaintiffs brought suit on April 3, 2002, alleging that Ordinance 121 violated the one-person-one-vote requirement under the Equal Protection Clause

of the Fourteenth Amendment. After trial, the court dismissed the complaint as moot. The court found that Ordinance 121 had been repealed by Ordinance 122, which equally redistributed the population into three wards, and that plaintiffs no longer had an interest in an actual ongoing case or controversy. Plaintiffs then moved to supplement or amend their complaint to include the allegations currently pending before the court regarding Ordinance 122. The court granted plaintiffs' motion to supplement their complaint.

Following an eleven-day court trial, the court issued findings of fact and conclusions of law. (Docket 371). The court found that plaintiffs failed to prove by a preponderance of the evidence that the third *Gingles* precondition was satisfied. As a result, the court concluded that plaintiffs cannot prevail on their "effects" claim. The court also found that plaintiffs could not prevail on their "intent" claim because the court found that there was no evidence that Ordinance 122 was adopted with discriminatory intent, and because plaintiffs' failure to prevail on their "effects" claim prevents them from prevailing on their "intent" claim.

Plaintiffs appealed to the Court of Appeals for the Eighth Circuit. *Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir.2006). The Eighth Circuit held that the court erred in finding that the third *Gingles* precondition was not satisfied, and it found that plaintiffs met all three *Gingles* preconditions and remanded the case to the district court to determine based upon the totality of the circumstances whether Ordinance 122 had a discriminatory effect. *Id.* at 1122. Regard-

ing plaintiffs' "intent" claim, the Court of Appeals affirmed the court's finding that there was no evidence of discriminatory intent in passing Ordinance 122. *Id.* at 1121 n. 6.

DISCUSSION

Section 2 of the Voting Rights Act of 1965, as amended, prohibits the use of any voting practice which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority. 42 U.S.C. §§ 1973(a), 1973b(f)(2); *Thornburg v. Gingles,* 478 U.S. 30, 44, 106 S.Ct. 2752, 2763, 92 L.Ed.2d 25 (1986). A violation of § 2 is established "if, based on the totality of the circumstances, it is shown that ... [members of a protected minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The voting strength of a politically cohesive minority group can be diluted either "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." *Johnson v. De Grandy,* 512 U.S. 997, 1007, 114 S.Ct. 2647, 2655, 129 L.Ed.2d 775 (1994). Both the dispersal of Indians into districts in which they constitute an ineffective minority of voters or the concentration of Indians into districts where they constitute an excessive majority may dilute racial minority voting strength. *Voinovich v. Quilter,* 507 U.S. 146, 154, 113 S.Ct. 1149, 1155, 122 L.Ed.2d 500 (1993).

The Supreme Court has established a test to prove vote dilution through the use of multimember districts under § 2 of the VRA:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 51, 106 S.Ct. 2752, 92 L.Ed.2d 25. The Eighth Circuit found on appeal "that the plaintiffs met, by a preponderance of the evidence, all three Gingles preconditions." *Cottier*, 445 F.3d at 1122.

Upon satisfying these three *Gingles* preconditions, the court must then consider the totality of the circumstances "to determine, based upon a searching practical evaluation of the past and present reality whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 78, 106 S.Ct. 2752, 92 L.Ed.2d 25. The Eighth Circuit remanded this matter to this court to conduct

the totality of the circumstances analysis.

Although satisfaction of the three *Gingles* preconditions "takes the plaintiffs 'a long way towards showing a section 2 violation,' " *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1021 (8th Cir.2006) (quoting *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir.1995)), the court still must engage in a searching analysis based upon the totality of the circumstances to determine whether members of the protected minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See Bone Shirt*, 461 F.3d at 1021; *see also* 42 U.S.C. § 1973(b). According to the Supreme Court, the district courts should consider the following "Senate" factors during the totality of the circumstances analysis:

> (1) the history of voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the state or subdivision is racially polarized; (3) the extent to which the state or subdivision has used voting practices or procedures that tend to enhance opportunities for discrimination against the minority group; (4) whether minority candidates have been denied access to any candidate-slating process; (5) the extent to which minorities have borne the effects of past discrimination in relation to education, employment, and health; (6) whether local political campaigns have used overt or subtle racial

> appeals; (7) the extent to which minority group members have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the minority group; and (9) whether the policy underlying the use of voting qualifications is tenuous.

Cottier, 445 F.3d at 1122 (internal quotation omitted); *see also Gingles*, 478 U.S. at 36-37, 106 S.Ct. 2752, 92 L.Ed.2d 25. Proportionality is another factor that may 9 affect the totality of the circumstances analysis. *See Johnson*, 512 U.S. at 1020 & n. 17, 114 S.Ct. 2647, 129 L.Ed.2d 775. "Two factors predominate the totality-of-circumstances analysis: the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme." *Bone Shirt*, 461 F.3d at 1022; *see also Cottier*, 445 F.3d at 1122.

1. History of Voting-Related Discrimination

According to the first Senate factor, the court considers "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process." *Bone Shirt*, 461 F.3d at 1021.

> Without a doubt a history of discrimination against a minority is important evidence of both discriminatory intent

> and discriminatory results. A history of pervasive, purposeful discrimination may provide strong circumstantial evidence ... (1) that present day acts of elected officials are motivated by the same purpose, or by a desire to perpetuate the effects of that discrimination, (2) that present day ability of minorities to participate on an even footing in the political process has been seriously impaired by the past discrimination, and (3) that past discrimination has also led to present socio-economic disadvantages, which in turn reduces participation and influence in political affairs.

Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5, S.D., 804 F.2d 469, 474 (8th Cir.1986). The first Senate factor does not focus on present discrimination; instead the court must consider "the vestiges of discrimination which may interact with present political structures to perpetuate a historical lack of access to the political system." *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1211-12 (5th Cir.1989) (*Westwego I*), *cited with approval by Bone Shirt*, 461 F.3d at 1022.

There is a long, elaborate history of discrimination against Indians in South Dakota in matters relating to voting in South Dakota. *See Buckanaga*, 804 F.2d at 474 (noting evidence of South Dakota's history of discrimination against Indians in matters related to voting); *Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976, 1019-23 (D.S.D.2004), *aff'd*, 461 F.3d 1011 (8th Cir.2006) (detailing the lengthy history of

official discrimination by the State of South Dakota against Indians in the areas of voting and representation). For example, "South Dakota officially excluded Indians from voting and holding office until the 1940s." The court in *Bone Shirt* also noted several instances of more recent discrimination against Indians by both the State of South Dakota and political subdivisions within South Dakota. *Id.* at 1023-26. The same evidence of discrimination was presented in both *Bone Shirt* and this case. *Compare* Ex. 185 *with* Ex. 564.[2] As a result, the court incorporates the detailed description of discrimination against Indians in South Dakota touching the right to vote and participate in politics as set forth in *Bone Shirt*.

Dr. Daniel McCool, one of plaintiffs' experts, also provided a report detailing the history of official acts by the State of South Dakota seeking to prevent Indians from exercising their right to vote. Ex. 185. As the court indicated in its previous memorandum, it finds that Dr. McCool is qualified as an expert, and that McCool's report provides a reliable and credible discussion of the history of discrimination against Indians regarding the right to vote.

Like South Dakota, Bennet County also has a history of racial discrimination affecting Indian's participation in the political process. For instance, Indians have had difficulty registering to vote in Bennett County. In *Bone Shirt*, 336 F.Supp.2d at 1025, the court detailed the difficulty Indians had obtaining voter registration cards from the Bennett

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[2] The court notes that the city of Martin is within the legislative districts that were in dispute in *Bone Shirt*.

County Auditor. The court incorporates those findings here.

Relying on *National Association for the Advancement of Colored People, Inc. (NAACP) v. City of Niagara Falls, New York,* 913 F.Supp. 722 (W.D.N.Y.1994) (*NAACP*), *aff'd,* 65 F.3d 1002 (2d Cir.1995), defendants argue that this evidence of discrimination in South Dakota and Bennett County is irrelevant because it does not focus specifically on the City of Martin. In *NAACP,* plaintiffs challenged the at-large method of electing city council members for the City of Niagara Falls as violative of § 2 of the VRA. Plaintiffs presented expert testimony that detailed the history of discrimination regarding participation in the political process in the State of New York as a whole. The court gave little weight to the expert's opinions for three reasons: (1) the expert's analysis stopped at 1980; (2) the court questioned the expert's reliance upon interviews to support her conclusions; and (3) the evidence of discrimination related to the State of New York rather than specifically to the City of Niagara Falls.

The court disagrees that *NAACP* makes the evidence of discrimination relating to voting in South Dakota and its other political subdivisions per se irrelevant to whether Martin also exhibits a similar history of discrimination. Instead, in some circumstances, a history of state-wide discrimination may be relevant. *See Westwego Citizens for Better Gov't v. City of Westwego,* 946 F.2d 1109, 1121-22 (5th Cir.1991) (*Westwego III*); *see also United States v. Blaine County, Mont.,* 363 F.3d 897, 913 (9th Cir.2004). In *Westwego III,* plaintiffs challenged the

structure of the city government as violative of § 2. The district court found that Louisiana and Jefferson Parish both exhibited a long history of racial discrimination touching voting and participation in the political process. Nevertheless, the district court found that plaintiffs had presented no evidence of discrimination in Westwego, and thus, this factor weighed in favor of defendants.

The Court of Appeals for the Fifth Circuit held that this finding was clearly erroneous because the district court found other evidence of discrimination in Westwego itself. The district court found that a large socioeconomic gap existed between whites and minorities in Westwego, that much of the housing in Westwego was racially segregated, and that minorities were excluded from civic organizations that played important roles in Westwego's political life. Based thereon, the district court explicitly found that " '[t]here is substantial evidence that blacks in Westwego continue to bear the effects of discrimination,' " and that " 'Westwego is not an island in itself in the history of Louisiana in terms of discrimination.' " *Id.* at 1121, 1222 (alteration in original). The Fifth Circuit concluded that these findings were inconsistent with the district court's finding that plaintiffs had presented no history of discrimination in Westwego limiting minority access to the political system. *Id.* at 1122. In essence, the Fifth Circuit concluded that a history of discrimination touching the right to vote in Louisiana and Jefferson Parish was not only relevant but, when considered with other evidence of racial discrimination in Westwego itself, proved a history of discrimination in Westwego that

"combined with the existing political structures in Westwego to 'perpetuate a historical lack of access to the political system.' " *Id.*

Like *Westwego*, the court finds that the City of Martin is "not an island" in the history of discrimination in South Dakota. First, as discussed more fully below, Indians in Martin continue to suffer the effects of past discrimination, including lower levels of income, education, home ownership, automobile ownership, and standard of living. *See infra* ¶ 5.

Second, Russell Waterbury, the former sheriff of Bennett County and a former resident of Martin, testified that "there's really not much difference in terms of politics between what goes on in Bennett County as a whole and what goes on in Martin." T.VIII., p. 1564.

Third, several residents of Martin testified that they felt discriminated against when attempting to vote. For instance, Pearl Cottier testified that she personally felt intimidated when attempting to vote because there were no Indian poll workers. T.I., p. 251. Alice Young also testified that Indians felt uncomfortable and unwelcome when voting in Martin. T.III., p. 538. Between 1980 and 2002, 107 poll watchers worked the 14 municipal elections. Ex. 257. Only 10 of those poll watchers were Indian. Ex. 258. Additionally, in 7 of the 14 elections, all the poll watchers were white.

Fourth, evidence indicates that Martin city officials have taken intentional steps to thwart Indian voters from exercising political influence. In 2002, Bob Fogg, an Indian, tried to file a petition that

would have referred Ordinance 122 to a public vote. Fogg turned the petition in to Martin Finance Officer Speidel on April 29, 2002. T.X., p. 2172. Although Speidel determined that the petition did not have enough signatures by the end of the day, she did not inform Fogg until after the deadline for filing the petition. T.X., p. 2175, 2177. Speidel also testified that she usually tells the person submitting a nominating petition if the petition lacks sufficient signatures. T.X., p. 2175 The court finds that this is an intentional act by a Martin city official seeking to prevent voters, and in particular Indians who were negatively affected by Ordinance 122, from deciding whether Ordinance 122 should be enforced.

Fifth, like *Westwego*, Martin has a civic organization-the commercial club-that is politically active. Although the commercial club does not explicitly exclude Indians, Indians are significantly under represented in the commercial club. Monica Drapeaux, an Indian business owner, testified that even though she paid her dues, she was not an active member of the commercial club. T.II., 299-301. Drapeaux also testified that Indians comprised only 2 or 3 percent of the commercial club and that Indians were under represented.

Sixth, there is history of discrimination in lending in Martin. In 1993, the United States filed a lawsuit against Blackpipe State Bank, which is located in Martin, alleging that Blackpipe State Bank discriminated against Indians in violation of the Equal Credit Opportunity Act and Title VIII of the Civil Rights Act. Ex. 147. The case was settled through a consent decree. Ex. 149. Although Black-

pipe State Bank denied the allegations, it agreed, among other things, to end its explicit policy of refusing to make secured loans subject to tribal court jurisdiction and to provide compensation of not more than $125,000 to each person adversely affected by its policies and practices. *Id.* Drapeaux, a successful business woman, testified that she was refused several loans by Blackpipe State Bank, that other banks located farther away readily loaned her the money, and that white people with weaker financial credentials obtained loans. T.II., p. 312-15.

Seventh, the controversy surrounding a Martin high school homecoming ceremony involving Indian dresses and headdresses is additional evidence of racial discrimination. As discussed by the court in *Bone Shirt,* 336 F.Supp.2d at 1033, some Indians found that ceremony offensive and tried to end the ceremony. This led to a public forum in 1995 and many whites did not want to change the ceremony. The ceremony was finally abolished in 1996 to satisfy Indian objections. *See id.*

Based on the foregoing discussion of racial discrimination in Martin, the court finds that Martin is "not an island" separate from the history of discrimination in South Dakota and Bennett County. As a result, the court finds that plaintiffs have established that South Dakota, Bennett County, and Martin all have a history of discrimination against Indians that touches Indians' ability to register, to vote, and to actively participate in the political process. *See Westwego III,* 946 F.2d at 1121-22. The court finds that the first Senate factor weighs in favor of plaintiffs.

2. Racially Polarized Voting

The second Senate factor considers "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Bone Shirt*, 461 F.3d at 1021. Racially polarized voting exists "where there is a consistent relationship between [the] race of the voter and the way in which the voter votes ... or to put it differently, where [minority] voters and white voters vote differently." *Gingles*, 478 U.S. at 54 n. 21, 106 S.Ct. 2752, 92 L.Ed.2d 25 (internal quotation omitted) (first alteration in original); *see also League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 748 (5th Cir.1993) (*LULAC*). This is one of the two most important Senate factors in the totality of the circumstances analysis. *See Gingles*, 478 U.S. at 49 n. 15, 106 S.Ct. 2752, 92 L.Ed.2d 25; *see also Harvell*, 71 F.3d at 1390.

The court finds that there is a persistent and unacceptable level of racially polarized voting in the City of Martin. The court begins its analysis with Martin aldermanic elections because these elections are the most probative. *See Bone Shirt*, 461 F.3d at 1022 & n. 10 (suggesting that elections for posts subject to the challenged districting plan are most probative). The Eighth Circuit on appeal explicitly found that since adoption of Ordinance 122, the Indian-preferred candidate has lost in every aldermanic election. *See Cottier*, 445 F.3d at 1122.

The Eighth Circuit also concluded that the 2003 exit poll performed by Dr. Steven Cole revealed racially polarized voting. *See Cottier*, 445 F.3d at 1122. Among other races, the exit poll covered the

aldermanic election in wards I and III. According to the poll results, 100 percent of Indians supported the Indian-preferred candidate in the ward I election. Ex. 188, at 10. Despite overwhelming Indian support, the Indian-preferred candidate lost. The maximum number of whites that voted for the Indian-preferred candidate was 25 percent,[3] indicating a high degree of polarization. The exit poll results for the ward III City Council race indicates that the Indian-preferred candidate lost despite receiving 85.7 percent of the Indian vote. Ex. 188, at 11. The maximum level of white voters who voted for the Indian-preferred candidate was 36.7 percent. Ex. 188, at 12. The court finds that the exit polls in the 2003 aldermanic election, along with the loss of every Indian-preferred candidate since adoption of Ordinance 122, strongly indicates racially polarized voting in endogenous elections.

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[3] Dr. Cole acknowledges that the small number of white voters that responded to his exit poll prevented him from accurately predicting the level of white-crossover support for Indian-preferred candidates. Dr. Cole can, however, predict the maximum level of white-crossover support. Dr. Cole knows the number of votes that each candidate received as well as the number of white voters in the election. Therefore, to calculate the maximum white-crossover, he took the total number of votes that the Indian-preferred candidate received, subtracted the number of votes for that candidate reported by Indian participants in the exit poll, and then assumed that all other votes received by the Indian-preferred candidate were white-crossover votes. This enabled him to calculate the maximum level of white-crossover support for the Indian-preferred candidate. In doing so, Dr. Cole's survey likely underestimated racial polarization because it presumed that every Indian who did not participate in the exit poll voted against the Indian-preferred candidate.

Although it is less probative than the aldermanic elections, the exit poll for the 2003 school board election also indicates voting was racially polarized. According to poll results, the two Indian-preferred candidates received 82.7 percent and 58.8 percent of the Indian vote. Ex. 188, at 8. These candidates finished fourth and fifth respectively out of six candidates. The maximum white-crossover for the Indian-preferred candidates was 14.6 percent and 6.3 percent respectively. Ex. 188, at 9.

Dr. Cole's statistical analysis of exogenous elections also indicates racially polarized voting. Dr. Cole employed the ecological inference (EI) or the King method to estimate racial bloc voting in Martin. Ex. 186, at 12. Dr. Cole applied this technique to federal, state, and county elections between 1996 and 2002. Dr. Cole could not apply his statistical analysis to the endogenous elections, however, because there were too few precincts involved in the elections. In its previous order, the court fully explained Dr. Cole's technique and found his statistical analysis scientific, reliable, and credible. (Docket 371, at 23-27). The court incorporates those findings here.

According to Dr. Cole, racial polarization exists in contests involving two candidates "when a majority of the voters of one race would elect a different candidate than would the majority of voters of the other race.... In head to head contests with more than two candidates, significant racial polarization is exhibited when a majority/plurality of the voters in one race would elect a different candidate than would a majority/plurality of voters of the opposite race." Ex. 186, at 6. Based on this definition and his statistical

analysis, Dr. Cole opined that voting in the City of Martin was polarized in 6 out of 7 (85.7 percent) interracial, head-to-head, exogenous contests. Ex. 186, at 25. The average level of white support for Indian-preferred candidates in these six racially polarized elections was only 11 percent. Ex. 186, at 25. In non-interracial contests, Dr. Cole opined that voting was racially polarized in Martin in 24 of 28 (86 percent) exogenous, head-to-head elections. Ex. 186, at 26. The average white support for Indian-preferred candidates in these racially polarized elections was 29 percent. Ex. 186, at 26. As further indication of racial polarization, Dr. Cole noted that white-crossover voting decreases from 29 percent to 11 percent whenever there is an Indian candidate in the field. Ex. 186, at 27.

Dr. Ronald E. Weber, defendants' expert, replicated Dr. Cole's EI analysis of voting in Martin. Dr. Weber's statistics indicate that voting in Martin was racially polarized in 6 of 7 (85.7 percent) of the interracial, head-to-head, exogenous elections. Ex. 450, Table 3. Voting was racially polarized in 24 of 28 (85.7 percent) non-interracial, head-to-head, exogenous elections. Ex. 450, Table 4. This further supports a finding that elections in the City of Martin are racially polarized to a high degree.

Dr. McCool's report also supports a finding of racially polarized voting in Martin. According to Dr. McCool, the history of racial tension between Indians and whites has created "an 'us-versus-them' political environment." Ex. 185, at 45. Although Dr. McCool was referring to the general political arena in South Dakota, the City of Martin, as discussed above, has a

similar history of racial discrimination. Dr. McCool's observation that a history of racial discrimination has led to racially polarized voting would likely apply to the City of Martin. And in fact, the foregoing statistics reveal racially polarized voting.

The testimony of several lay witnesses further indicates racially polarized voting. For instance, Susan Williams, the Bennett County Auditor, admitted that "in recent elections in Bennett County and in Martin, there has been an Indian versus white mentality[.]" T.X., p. 2229. Pearl Cottier testified that white and Indian voters are separated, and that white voter turnout in Martin increases whenever an Indian candidate runs for office. T.I., p. 252.

Defendants argue that there is no racially polarized voting in the City of Martin. Instead, defendants cite to testimony allegedly indicating that the "us-versus-them" mentality actually refers to the division between Indian members of the LaCreek Civil Rights Group and other Indians who live in Martin. The court finds, however, that this testimony indicates that not all Indians are members of the LaCreek Civil Rights Group, and that Indians disagree with other Indians on some issues. Further, even if this testimony indicated that voting was not polarized in Martin, the court would find it incredible because it conflicts with the statistical evidence, which shows overwhelming levels of racially polarized voting.

Defendants also suggest that partisanship rather than race drives the racially polarized voting in the City of Martin. Specifically, defendants note that most Indians vote democrat, and this political

affiliation explains the divergent voting patterns between whites and Indians in Martin. The court disagrees. The court finds that partisanship has no effect on the racially polarized voting indicated in Martin aldermanic elections held under Ordinance 122 because these elections are nonpartisan. As a result, even if partisanship could explain the racially polarized voting in the partisan, exogenous elections discussed above, it does not explain the racially polarized voting that exists in the most probative elections, namely those held for Martin City Council under Ordinance 122. *See Bone Shirt*, 461 F.3d at 1022 & n. 10.

In sum, the court finds that the overwhelming statistical evidence establishes that racially polarized voting exists in Martin. This finding is further supported by testimony describing an "us-versus-them" mentality in the Martin. The court thus finds that the second Senate factor weighs heavily in favor of plaintiffs.

3. Voting Practices or Procedures That Tend to Enhance Opportunities for Discrimination

The third Senate factor requires the court to determine "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Bone Shirt*, 461 F.3d at 1021. Staggered terms can further dilute the voting power of minorities because "they limit the number of seats, create more head-to-head contests between

white and minority candidates, which highlight the racial element and minimize the influence of single-shot voting." *Buckanaga*, 804 F.2d at 475 (citing *City of Rome v. United States*, 446 U.S. 156, 185 & n. 21, 100 S.Ct. 1548, 1565, 1566 n. 21, 64 L.Ed.2d 119 (1980)); *see also Blaine County, Mont.*, 363 F.3d at 913 & n. 25 (staggered terms prevent single-shot voting).

The aldermanic elections in Martin utilize staggered terms. The court finds that these staggered terms increase the likelihood of head-to-head races for City Council. Further, because whites are a majority in each district and the white voters vote cohesively, staggered terms enable the white voters to elect their candidate of choice in these head-to-head races. *See Buckanaga*, 804 F.2d at 475 ("[A] staggered term requirement combined with a white majority and white block voting places a minority at a severe disadvantage."). The staggered terms also work to prevent single-shot voting by Indians. In fact, Dr. Ronald Weber, a defense expert, testified that the staggered terms used by Martin "are an anti-single shot provision." T.VI., p. 1079-80.

The court also finds that the majority vote requirement previously imposed on Martin aldermanic elections enhanced the opportunity for discrimination against the minority group. The majority vote requirement prevents an Indian-preferred candidate with a plurality of the votes from winning if multiple white-preferred candidates split the white vote. Instead of a plurality winner, the majority vote requirement requires a head-to-head, run-off election, which again favors whites who are the majority

group in each ward. The vast evidence of racially polarized voting in Martin indicates that Indian-preferred candidates in head-to-head races will seldom prevail. This is further supported by the fact that since adoption of Ordinance 122, every Indian-preferred candidate in a contested election for the City Council has lost.

Defendants note that Martin no longer requires a majority vote requirement. The testimony of Brad Otte indicates that the Martin City Council passed an ordinance to permit a win by plurality vote in elections for City Council. T.IX., p.1935-36. Although the court agrees that this alleviates some of the risk of diluting the minority vote, the court finds that under the circumstances of this case, and in particular the evidence of racially polarized voting, staggered terms alone work to dilute the Indian vote. *See Buckanaga*, 804 F.2d at 475. Without the majority vote requirement, however, the court finds that the third Senate factor only weighs slightly in favor of plaintiffs.

4. Denial of Access to Candidate-Slating Process

The fourth Senate factor requires the court to determine "if there is a candidate-slating process, whether the members of a minority group have been denied access to that process." *Bone Shirt*, 461 F.3d at 1021. A slating process exists when "some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected." *Westwego III*, 946 F.2d at 1116

n. 5; *see also Reed v. Town of Babylon*, 914 F.Supp. 843, 887 (E.D.N.Y.1996).

Plaintiffs concede that there is no formal slating process for Martin City Council. Instead, plaintiffs argue that the commercial club, which they claim excludes Indians, acts as an informal slating process. The court finds, however, that the evidence does not support this contention. At most, the evidence indicates that some members of the commercial club are community leaders, and that the commercial club sometimes concerns itself with local politics. T.II., p. 300, 304-07; T.III., p. 555. In fact, Drapeaux, an Indian member of the commercial club, described the club as "just a group of merchants, local merchants, that organize and promote retail business." T.II., p. 299. There is simply no evidence indicating that the commercial club determines who wins aldermanic elections.

Plaintiffs also suggest that the Bennett County Democratic Committee acts as a slating process. Plaintiffs point to an instance where the Bennett County Democratic Committee supported a slate of independent candidates for elected positions in Bennett County after several Indians won the democratic primary for those positions.

Although local political parties can act as slating processes, *see Goosby v. Town Board of the Town of Hempstead, New York*, 180 F.3d 476, 496-97 (2d Cir.1999), there is no evidence in this case that the Bennett County Democratic Committee determined who would win municipal elections. The municipal elections in Martin are non-partisan. Ex. 448, at 11. Further, the Bennett County Democratic Commit-

tee's support of slate of independent candidates was for county, not municipal, offices. As such, the court finds that the Bennett County Democratic Party is not an informal slating process for Martin aldermanic elections.

Finally, plaintiffs suggest that Indians have difficulty being elected in municipal elections because Indians are under represented in municipal appointments and because racial discrimination makes campaigning difficult in Martin. These instances do not, however, constitute an informal slating process. *See Westwego III*, 946 F.2d at 1116 n. 5.

In sum, the court finds that there is no formal or informal slating process for candidates seeking election to the Martin City Council. As a result, this Senate factor weighs in favor of defendants.

5. Effects of Past Discrimination in Education, Employment, and Health

The fifth Senate factor requires the court to determine "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and heath, which hinder their ability to participate effectively in the political process." *Bone Shirt*, 461 F.3d at 1011. The Senate Report accompanying amendment of § 2 of the VRA explains the rationale and the nature of the inquiry for this factor:

> [D]isproportionate educational, employment, income level and living conditions arising from past discrimination

> tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S.Rep. No. 97-417 (1982), *reprinted in* 182 U.S.C.C.A.N. 177, 206 n. 114 (hereinafter referred to as Senate Report). "[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles,* 478 U.S. at 69, 106 S.Ct. 2752, 92 L.Ed.2d 25.

Under this factor, plaintiffs are not required to prove that racial discrimination or disparities caused, in whole or in part, depressed levels of minority political participation. *See United States v. Marengo County Comm'n,* 731 F.2d 1546, 1569 (11th Cir.1984). Rather, the burden is on "those who deny the causal nexus to show that the cause is something else." *Id. See Whitfield v. Democratic Party of State of Ark.,* 890 F.2d 1423, 1431 (8th Cir.1989). The disparities are the effects of discrimination to which the Senate factor refers. *Harvell,* 71 F.3d at 1390. A court must specifically address evidence of discrimination against Indians and "any lingering effects of discrimination as evidenced by economic and social disparity between Indians and whites and the effect of this discrimination and disparity upon Indian political participation." *Buckanaga,* 804 F.2d at 474-75.

The Eighth Circuit has explicitly recognized that Indians in South Dakota continue to bear the burdens of past discrimination, which hinders their ability to participate in politics. In *Bone Shirt,* the Eighth Circuit noted the history of discrimination against Indians in South Dakota and stated that "the historic effects of discrimination in the areas of health, employment, and education impact negatively on the ability of Indians to participate in the political process." *Bone Shirt,* 461 F.3d at 1022 (internal quotation omitted); *see also Buckanaga,* 804 F.2d at 474-75 (noting that substantial evidence indicated economic disparities between Indians and whites in South Dakota and that a lesser percentage of Indians were registered to vote when compared to whites).

The court finds that Martin is no different. The Summary File 3(SF3) from the 2000 census contains socioeconomic data produced by the United States Census Bureau. SF3 is created by responses to the 2000 census long form. T.H., p. 437. Only one in six people receive a long form. T.H., p. 437. SF3 assigns respondents to racial categories using the single-race method only. Ex. 180, at 21.

SF3 indicates that Indians in Martin bear the effects of past discrimination in the area of education. Of the Indians 25 years of age or older in Martin, 36.4 percent have not finished high school, whereas only 16.1 percent of their white counterparts have not finished high school. Ex. 180, at 22. The dropout rate among Indians between the ages of 16 and 19 is 21.4 percent, whereas only 3.4 percent of whites dropout. *Id.* Only 9.7 percent of Indians over

the age of 25 have a bachelor's decree or higher, whereas 20.3 percent of whites have received at least a bachelor's degree. *Id.*

Past discrimination also affects the employment and income levels of Indians in Martin. According to SF3, in 2000, the unemployment rate of Indians was 15.8 percent. Ex. 180, at 22. This is over five times higher than the rate for whites-3 percent. *Id.* The median family income for Indian households in Martin was $20,972, and 35.5 percent reported income below $10,000. Ex. 180, at 23. The median family income for white households was $45,714 and only 14.6 percent reported household income below $10,000. *Id.* 44 percent of Indians lived below the poverty rate, which is over four times higher than the number of whites (10 percent). Additionally, at least 40 percent of Indian children lived in poverty, while no white children were living in poverty. *Id.* Finally, the median level of earnings for an Indian person working full time in 1999 was $19,808; the median level of earnings for a white worker was $26,944.

Decreased earnings and employment are further illustrated in the level of home ownership. Compared to whites (31.2 percent), twice as many Indians (62.6 percent) rented their homes. Ex. 180, at 22. Of those that rented, 26.8 percent of Indians paid more than half of their income to rent, compared to only 10.6 percent of whites. The value of homes owned by Indians was also substantially lower. The median home value for Indian owners was $9,999, whereas the median home value for white owners was $39,9000. *Id.* Further, 18.2 percent of Indian homes

in Martin lacked telephones and 17.2 percent lacked access to a car. Ex. 180, at 23-24. Only 1.1 percent of white households were without a phone and 7.2 percent lacked access to a car. *Id.* The foregoing is overwhelming evidence indicating that burdens of discrimination still affect the education, employment, and health of Indians in Martin.

Defendants argue that the economic statistics included in SF3 are not reliable because the small number of households in Martin creates a large sampling error. Although a sampling error exists, the court finds that the statistics are sufficiently reliable. More important than a precise determination of the education or income levels of Indians in Martin is the trend that whites are generally better off. In any event, the court finds that the statistics contained in the SF3 indicate such a wide disparity between whites and Indians that the sampling error has little, if any, effect on the general relationship between whites and Indians. This disparity is further supported by the SF3 statistics for Bennett County, which because of its larger population, has a smaller risk of sampling error. Like Martin, the Bennett County statistics indicate that as a group Indians lag significantly behind whites. Ex. 180, 24-26.

Defendants also point to Dr. Weber's testimony indicating that the economic disparity between Indians and whites is not as severe as indicated by the SF3 statistics because SF3 fails to account for the earned income credit obtained by some impoverished people and various subsidies or government programs such as housing subsidies, Medicaid, or the provision of health benefits by Indian Health Ser-

vices. T.V., p. 1008-09. There is no evidence, however, indicating how much, if any, these additional sources of income would decrease the economic disparity between Indians and whites in Martin. The court thus finds that the SF3 statistics are reliable enough to indicate that whites, as a group, generally have higher levels of income and education when compared to Indians in Martin.

The record also establishes that Indians suffer from depressed participation in the political process. Dr. Cole was able to determine that 30.7 percent of the voters in the 2003 Martin municipal election were Indian. Ex. 188, at 6. In 2000, Indians comprised 36 percent of the VAP in Martin. Ex. 180, at 9. As a result, if Indians were turning out to vote at the same rate as whites, then they should have represented approximately 36 percent of the voters in the 2003 municipal election. Because they did not, this indicates a higher turnout rate for whites when compared to Indians in Martin.

Further, as discussed above, Indians have been substantially under represented as poll workers in Martin municipal elections. This absence of Indian poll workers adversely affects Indian participation in voting. T.III., p. 537.

Dr. McCool also indicated several factors that have contributed to reduced political participation by Indians in Martin, including a "combination of past and present discrimination, resistance to Indian voter registration, a hostile political and social environment, limited reading comprehension and understanding of election laws and precinct boundaries by tribal members, and extreme poverty...." Ex. 185, at

52. Dr. McCool also noted that political science literature indicates poverty causes decreased political participation. Ex. 185, at 52; *see also Whitfield,* 890 F.2d at 1431 ("Inequality of access is an inference which flows from the existence of economic and educational inequalities." (internal quotation omitted)).

In short, the court finds that Indians continue to suffer the effects of discrimination, including lower levels of income and education. Additionally, the court finds that Indians in Martin suffer from depressed levels of political activity. As a result, the fifth Senate factor weighs in favor of plaintiffs.

6. Use of Racial Appeals in Campaigns

The sixth Senate factor requires the court to determine "whether political campaigns have been characterized by overt or subtle racial appeals." *Bone Shirt,* 461 F.3d at 1022. Racial appeals occur when either an opponent or the media call attention to the race of one candidate or that candidate's supporters. *See Williams v. City of Dallas,* 734 F.Supp. 1317, 1360 n. 119 (N.D.Tex.1990).

Racial appeals have been employed in state elections as well as Bennett County elections. In 1998, when the democratic nominee for governor picked Elsie Meeks as a running mate, the headline in South Dakota's largest newspaper read "Hunhoff Picks Indian Woman As Running Mate." Ex. 4. In 2002, several media outlets, including the local newspaper in Martin, ran advertisements suggesting voter fraud by Indians, even though there was no evidence of fraudulent activity. Ex. 14; Ex. 15; Ex. 16; Ex. 54; Ex. 55; Ex. 102. Finally, during the 2002

primary and general elections for Bennett County commissioner, some white voters in Bennett County spread rumors indicating that Indian candidates would place deeded land back into trust if elected to the county commission. T. IX., p. 1910. Molly Risse testified that racial appeals were also used in the Martin municipal election. T.VIII., p. 1620.

In sum, the court finds that there is some evidence that racial appeals are used in elections in South Dakota. The court gives this factor little weight, however, because most of the racial appeals involved elections outside Martin. The court finds that this factor weighs in favor of neither plaintiffs nor defendants.

7. Success of Minority Candidates

The seventh Senate factor requires consideration of "the extent to which members of the minority group have been selected to public office in the jurisdiction." *Bone Shirt*, 461 F.3d at 1022. This is one of the two most important factors. *See Harvell*, 71 F.3d at 1390. Nevertheless, "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote." *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1397 (5th Cir.1996) (internal quotation omitted).

The evidence indicates that Indians have rarely been elected to the Martin City Council. According to Dr. Weber's report, four Indians have won a total of seven City Council elections between 1981 and 2002 in Martin. Ex. 448, at 26. During this time, there have been 29 elections for City Council in ward I. The only Indians to be elected in ward I were

Melva Marshall, who won a contested election in 1984, and Molly Risse, who won a contested election in 2001. Ex. 448, at 27-29. Molly Risse, however, was not an Indian-preferred candidate. T.I., p. 255; T.IV., p. 845-46. There were 26 elections in ward II. The only Indian elected in ward II was Dick Rose, who ran unopposed in both 1991 and 1993. Ex. 448, at 31-31. There have been 26 elections in ward III. Once again, only one Indian has won election in Ward III-Greg Claussen, who ran unopposed in 1994, 1995, and 1997. Thus, out of 80 elections for Martin City Council, Indians won only 7 elections (8.75 percent).

Although this evidence indicates that Indian candidates have had some limited success in seeking election to Martin City Council, on the whole, the court finds that this success is rare. Further, in 5 of the 7 successful elections, the Indian candidate ran unopposed. Ex. 448, at 27-34. In 3 of the 5 unopposed successes by Indians, the candidate was an incumbent. Ex. 448, at 33. As a result, the court gives little, if any, weight to the 5 elections in which Indians were elected under "special circumstances." *See Harvell,* 71 F.3d at 1389-90 (considering the special circumstances of incumbency and unopposed elections when discussing minority success).

Defendants suggest that the fact that some Indian candidates ran unopposed suggests that Indians have been successful at being elected to City Council, thereby indicating that Ordinance 122 does not unlawfully dilute the Indian vote. The court agrees that evidence that minority candidates run unopposed may in some instances indicate minority success. *See Jenkins v. Manning,* 116 F.3d 685, 694

(3d Cir.1997) (stating election between two minority candidates without a white challenger was evidence of minority success). Here, however, the court gives little weight to the fact that a few, unopposed Indian candidates were elected to the Martin City Council. First, the court finds that unopposed Indian candidates can be attributed mostly to Martin's small population rather than white acceptance of Indian candidates. Testimony indicates that Martin's small population means that there are often very few citizens interested in running for City Council. T.X., p. 2125. Second, the court finds that unopposed elections have little probative value on whether Martin's districting plan dilutes the Indian vote by fragmenting Indian voters among the three majority-white wards. Logically, if unopposed, Indian candidates will win regardless of how much the Indian vote has been diluted. *See Harvell*, 71 F.3d at 1389 ("Even in an extreme case of total vote dilution a candidate running in the face of no opposition is ensured success.").

In sum, the court finds that since 1981, only 7 elections for Martin City Council were won by an Indian. Further, an Indian has only won twice when the election was contested. And one of the prevailing Indian candidates was not the Indian-preferred candidate in that election. As a result, the court finds that Indians are rarely elected to the Martin City Council, and that the seventh Senate factor weighs in favor of plaintiffs.

8. Lack of Responsiveness

According to the Senate Report, an additional, relevant factor is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." Senate Report, 1982 U.S.C.C.A.N. at 207; *see also Bone Shirt,* 461 F.3d at 1022. "If the officials are unresponsive it suggests that they are willing to discriminate against minorities and need not be accountable to minority interests." *Marengo County Comm'n,* 731 F.2d at 1572. "Unresponsiveness is not an essential element of plaintiff's case," and thus, a showing of responsiveness does not bar plaintiffs from proving a § 2 violation. Senate Report, 1982 U.S.C.C.A.N. at 207 n. 116.

Plaintiffs suggest, and the court agrees, that the adoption of Ordinance 122 indicates a lack of responsiveness to the particularized needs of Indians. The record indicates that following adoption of Ordinance 121, the ACLU, acting on behalf of Indians in Martin, contacted Bill Lass of BHCLG. Ex. 175. The ACLU informed Lass that Ordinance 121 had two problems: (1) it was malapportioned; and (2) the district lines violated § 2 of the VRA by fragmenting Indian voters among the three wards. Ex. 175; T.VII, p. 1378. Regarding the first problem, Lass worked in conjunction with the Martin City Council to solve this issue. Ex. 445. Ultimately, the malapportionment problem was solved with the adoption of Ordinance 122.

Lass was not hired, however, to fix the § 2 violation. Ex. 445. Instead, he suggested that the ACLU direct future contact with the City of Martin. In re-

sponse, the ACLU wrote a letter to Mayor Kuxhaus on March 12, 2002. Ex. 176. The letter clearly indicated that the ACLU believed that although Lass's new districting proposal solved the malapportionment problem, it continued to violate § 2 of the VRA. Ex. 176. The City Council tabled the issue regarding whether Ordinance 121 violated § 2 of the VRA at its March 12, 2002, meeting so that the Martin City Attorney and the South Dakota Attorney General could look at the issue. T.X., p. 2120, 2164-65. The next City Council meeting was held on March 18, 2002. T.X., p. 2121. At the March 18 meeting, the City Council again tabled the § 2 issue. T.X., p. 2170. The City Council did, however, adopt Ordinance 122. T.X., p. 2122. Before adopting Ordinance 122, the City Council was informed that the South Dakota Attorney General's Office stated that Ordinance 122 fixed the malapportionment problem but as for the § 2 problem, "we don't know what we are going to do about it." T.IX., p. 1761. As a result, the court finds that the Martin City Council was aware that Ordinance 122 may violate § 2 when it adopted the ordinance. T.X., p. 2119, 2161-62. This disregard for whether Ordinance 122 dilutes the Indian vote indicates a lack of responsiveness to particular Indian needs.

Beyond failing to consider whether Ordinance 122 violated § 2 of the VRA, the court finds that Martin Finance Officer Speidel took affirmative steps to prevent voters in Martin, including Indian voters, from deciding whether to adopt Ordinance 122. Robert Fogg, an Indian, circulated a petition that would have referred Ordinance 122 to a public vote.

Ex. 255; T.VII, p. 1339. Fogg submitted the petition to Speidel on April 29, 2002. T.X., p. 2172. That same day, Speidel took Fogg's petition to the county auditor's office and determined that the petition lacked the sufficient number of signatures. *Id.* Rather than calling or immediately contacting Fogg, Speidel sent a letter to Fogg informing him about the deficiency. T.X., p. 2177. Speidel sent this letter after the deadline, and thus, Fogg could not gather additional signatures. *Id.* Speidel admitted that as a common courtesy, she informs someone who submits a nominating petition that the petition lacks sufficient signatures. The court thus finds that Speidel, while acting as a city official, purposefully acted to impede Fogg in referring Ordinance 122 for a public vote, which further indicates a lack of responsiveness.

The court also finds that Martin's management of its law enforcement contract with the Bennett County Sheriff's Department indicates a lack of responsiveness. In late 2001 and early 2002, several Indians, including members of the LaCreek Civil Rights Committee, complained to the City Council about the perceived discrimination and mistreatment of Indian people by Russell Waterbury, the Bennett County Sheriff, and his deputies. T.IV., p. 837-39, 858, 911-12; T.VIII., p. 1496-98, 1624, 1728-29; T.IX., p. 1946. At that time, Martin contracted with the Bennett County Sheriff to provide law enforcement services. Due to frustration with the sheriff, Indian voters mobilized in 2002 to defeat an incumbent mayor, the sheriff, and two county commissioners. Ex. 146; T.I., p. 262-66; T.IV., p. 839-41, 860-63. Then, in 2002, after Charlie Cummings, an Indian,

was elected as Bennett County Sheriff, Martin terminated its contract with the Bennett County Sheriff's Department to provide law enforcement services. T.IV., p. 861, 863-64. Martin started its own police department and hired Shane Valandra, one of Russell Waterbury's former deputies, as the new police chief. T.VII., p. 1416. Testimony indicates, however, that Valandra was unpopular with the Indian community, and that the City was aware of his unpopularity. T.VII., p. 1348; T.VIII., p. 1497-98.

Defendants argue that there was nothing they could do about Sheriff Waterbury's actions because he was an elected county official. The court disagrees. Although the Martin City Council could not remove the sheriff, it did have a contract with the sheriff's department for the provision of law enforcement services. Pursuant to this contract, Martin paid for two police cars and two deputies. T.IV., p. 863. Martin could terminate the law enforcement contract, thereby diminishing the sheriff's department's budget. The court finds that this empowered the City Council to exert pressure on Sheriff Waterbury. Indeed, the City Council utilized this power later when it disagreed with the actions of Sheriff Cummings. T.VII., p. 1412-14. There is no evidence, however, that the City Council used this power to influence Waterbury as a result of Indian complaints.

There is some evidence indicating that the City Council has responded to some Indian needs. For instance, Martin provides funding for a powwow each July. T.VII., p. 1421, 1471; T.VIII., p. 1627. Martin also provided funding to help build a sidewalk from Sunrise Housing to Martin. T.VII., p.

1421-22, 1471; T.IX., p. 1994-95. The court finds that these projects primarily benefitted Indians, and thus, indicate a responsiveness to Indian needs.

Although the evidence is mixed on whether the Martin City Council was responsive to Indian needs, the court finds that this factor weighs slightly in favor of plaintiffs. As noted, the City Council responded to Indian needs by funding the powwow and the sidewalk. The court finds, however, that these small benefits are outweighed by the City Council's disregard for the Indian concerns about Ordinance 122 and Sheriff Waterbury.

9. Tenuousness of City's Policy Drawing District Lines

One additional factor that may be relevant is whether "the policy underlying the jurisdiction's use of the current boundaries [was] tenuous." *Bone Shirt*, 461 F.3d at 1022. "[T]he tenuousness of the justification for the state policy may indicate that the policy is unfair." *Marengo County Comm'n*, 731 F.2d at 1571. Although the tenuousness of the state's justification for its policy is a relevant consideration in the totality of the circumstances analysis, " '[p]roof of a merely non-tenuous state interest ... cannot defeat liability.' " *Clark*, 88 F.3d at 1401 (quoting *League of United American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 871 (5th Cir.1993)) (alteration in original).

Plaintiffs argue that the Martin City Council has never offered a policy justification for adoption of Ordinance 122. They further argue that the adoption of Ordinance 122 must be tenuous because the City

Council was aware that Ordinance 122 might violate § 2 of the VRA when it adopted it. The court disagrees. Martin originally initiated redistricting, which culminated in adoption of Ordinance 121 in January of 2002, pursuant to its obligations following the 2000 census. T.X., p. 2114. This redistricting was done to reduce an unacceptable level of variation in population among the three wards. *Id.* Following adoption of Ordinance 121, the City Council learned that Lass had made a mistake in redrawing the three wards. This mistake resulted in malapportionment. T.X., p. 2115. The City Council adopted Ordinance 122 to solve this malapportionment problem. T.X., p. 2122. Thus, Martin's policy for adopting Ordinance 122 was to effect redistricting following the 2000 census and comply with the one-person-one-vote requirement imposed by federal law.

The court also finds that the City Council's knowledge that Ordinance 122 *may* violate § 2 of the VRA does not make Ordinance 122 tenuously connected to the reason for redistricting. The evidence indicates that a municipal election was impending. As a result, the City Council needed to have a districting plan in place to enable the candidates to circulate nominating petitions. T.VII., p. 1375; T.X., p. 2117. The City Council could not proceed with Ordinance 121, which was currently in effect, because Lass's mistake meant that Ordinance 121 violated the one-person-one-vote requirement. Ex. 175. Thus, the City Council needed to expeditiously adopt a districting policy. It chose to do so by adopting Ordinance 122.

The court also finds that the time constraints

imposed by the impending elections limited the City Council's ability to determine whether in fact Ordinance 122 violated § 2 of the VRA. Contrary to plaintiffs' contention, the City Council did not know for sure whether Ordinance 122 violated § 2 when it adopted Ordinance 122 at the meeting held on March 18, 2002. At most, the City Council knew that the ACLU believed that Ordinance 122 violated § 2 and the Martin City Attorney and South Dakota Attorney General's Office were looking at the issue. T.IX., p. 1761. In addition, whether Ordinance 122 violated § 2 presents a complicated, fact-intensive question of law that the City Council was unable to determine in time to hold the impending municipal election. Indeed, this exact question has culminated in over four years of litigation, an eleven-day trial, and an appeal.

In sum, the court finds that Ordinance 122 is not tenuously related to the Martin City Council's policy for adopting the ordinance. As a result, this factor weighs in favor of defendants.

10. Proportionality

The Supreme Court has indicated that proportionality is another relevant factor in determining whether a districting plan violates § 2 of the VRA. *See Johnson*, 512 U.S. at 1020-21 & n. 17, 114 S.Ct. 2647, 129 L.Ed.2d 775. Proportionality "links the number of majority-minority voting districts to the minority members' share of the relevant population." *Id.* at 1014 n. 11, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775.[4] Although proportionality provides "an

[4] Proportionality as used herein refers to a different concept than proportional representation, which is not a valid consid-

equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice,' " proportionality is not a safe-harbor that always bars plaintiffs from establishing a § 2 violation. *Id.* at 1020, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (quoting 42 U.S.C. § 1973(b)). On the other hand, disproportionality, as one factor in the totality of the circumstances analysis, may indicate a dilution of the minority vote in violation of § 2. *Id.* at 1020 n. 17, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775; *see also Stabler v. County of Thurston, Neb.*, 129 F.3d 1015, 1023 (8th Cir.1997) ("[P]roportionality is a relevant factor to be considered in the totality of the circumstances analysis.").

Here, the court finds that the three-ward system created by Ordinance 122 lacks proportionality. Indians comprise approximately 45 percent of Martin's population and approximately 36 percent of Martin's VAP.[5] Ex. 181. But Indians are not a ma-

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eration in a § 2 analysis. *See* 42 U.S.C. § 1973(b) (stating that § 2 does not "establish[ ] a right to have members of a protected class elected in numbers equal to their proportion in the population"). Proportional representation refers to the "success of minority candidates," whereas proportionality refers to "the political or electoral power of minority voters." *Johnson*, 512 U.S. at 1014 n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775.

[5] In *Johnson*, 512 U.S. at 1017 n. 14, 114 S.Ct. 2647, 129 L.Ed.2d 775, the Supreme Court refrained from deciding whether the proper population for determining proportionality is the minority's percentage of the population or the minority's percentage of VAP. Like the Supreme Court, the court here refrains from deciding this issue because the court finds that Ordinance 122 lacks proportionality irrespective of which population is used.

jority in any of the three wards created by Ordinance 122, however. Ex. 180, at 15. If Indians were a majority in one of the three wards, then Martin's districting system would exhibit much more proportionality. As a result, the court finds that Ordinance 122 is not proportional, and that this factor weighs in favor of plaintiffs.

CONCLUSION

After reviewing each of the Senate factors and the other relevant circumstances in this case, the court finds based on the totality of the circumstances that Ordinance 122 creates a districting plan that fragments Indian voters among all three wards, thereby giving Indians "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. As a result, the court finds that Ordinance 122 impermissibly dilutes the Indian vote and violates § 2 of the VRA.

Having concluded that Ordinance 122, which is Martin's existing districting plan, violates the Voting Rights Act, plaintiffs are entitled to a full and complete remedy. *See Bone Shirt,* 336 F.Supp.2d at 1052-53. Because redistricting is primarily within the province of the state or local government, the court will give defendants the first opportunity to propose a remedy for the § 2 violation in this case. *See Voinovich,* 507 U.S. at 156, 113 S.Ct. 1149, 122 L.Ed.2d 500. The court will then review defendants' proposed remedy "to determine whether it is 'legally unacceptable.' " *Cottier,* 445 F.3d at 1123 (quoting *Cane v. Worcester County, Md.,* 35 F.3d 921, 927 (4th

Cir.1994)).

Based on the foregoing, it is hereby

ORDERED that judgment be entered for plaintiffs on the issue of vote dilution in violation of § 2 of the Voting Rights Act of 1965.

IT IS FURTHER ORDERED that defendants shall have until **January 5, 2007,** to file remedial proposals consistent with this opinion for consideration by this court, and to brief the issue of whether defendants should be permanently enjoined from enforcing Ordinance 122 in any further election. Plaintiffs shall then have until **January 25, 2007,** to file any objections to defendants' remedial proposals and to respond to defendants' brief on the permanent injunction issue. Defendants shall then have until **February 6, 2007,** to respond to plaintiffs' brief.

Dated December 5, 2006.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 07-1628

PEARL COTTIER; REBECCA THREE STARS, Appellees, v. CITY OF MARTIN; TODD ALEXANDER, ROD ANDERSON, SCOTT LARSON, DON MOORE, BRAD OTTE, MOLLY RISSE, in their official capacities as members of the Martin City Council; JANET SPEIDEL, in her official capacity as Finance Officer of the City of Martin, Appellants.	*	Appeal from the United States District Court for the District of South Dakota

Submitted: September 23, 2009
Filed: May 5, 2010

Before RILEY, Chief Judge,[1] WOLLMAN, LOKEN, MURPHY, BYE, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

COLLOTON, Circuit Judge.

This appeal involves a claim that the City of Martin, South Dakota, and several of its officials violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(b). The plaintiffs contend that the defendants adopted and maintained an ordinance that impaired the ability of Native American Indians to participate in the political process and to elect representatives of their choice in city elections. Sitting en banc, we conclude that the district court properly dismissed the action in its order of March 22, 2005, which was reversed by a panel of this court. We therefore vacate the court's later judgment of February 9, 2007, and remand with directions to dismiss the action.

I.

Pearl Cottier and Rebecca Three Stars, members of the Oglala Sioux Tribe and residents of Martin, brought suit against the City, several members of the city council, and the City's former finance director, alleging violations of the Voting

[1] The Honorable William Jay Riley became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 1, 2010, succeeding the Honorable James B. Loken, who was Chief Judge when this case was submitted. COLLOTON, Circuit Judge.

Rights Act and the Constitution. The plaintiffs alleged that the City's Ordinance 122, which established boundaries for three voting wards within the City, diluted the votes of Indians in each ward, and thereby violated Section 2. They also alleged that the City enacted and maintained Ordinance 122 with a racially discriminatory purpose, in violation of Section 2 and the Fourteenth and Fifteenth Amendments.

After an eleven-day bench trial, the district court rejected the plaintiffs' claims and dismissed the action. *Cottier v. City of Martin*, No. 02-5021, slip op. (D.S.D. Mar. 22, 2005) (hereafter "*March 2005 Order*"). With respect to the Section 2 vote dilution claim, the court found that although the plaintiffs satisfied two of the three preconditions for liability that were established in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), they failed to show the third precondition, namely, that the "white majority" in the City voted "sufficiently as a bloc to enable it ... usually to defeat the [Indian] preferred candidate." *Id.* at 51, 106 S.Ct. 2752. The court also found no evidence of discriminatory intent in the passage of Ordinance 122, and dismissed the plaintiffs' alternative Section 2 claim and the constitutional claims on that basis.

On appeal, a divided panel of this court reversed on the vote dilution claim. *Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir.2006) (*Cottier I*). The court affirmed the district court's findings regarding the first two *Gingles* preconditions, but concluded that the district court clearly erred in finding that the third precondition was not satisfied. The court

remanded to the district court with instructions to determine whether, in view of this court's ruling that the plaintiffs had met all three *Gingles* preconditions, the plaintiffs were entitled to relief under the totality of the circumstances. If so, the district court was directed to devise and implement an appropriate remedy. The City's petition for rehearing en banc was denied, with five judges voting to grant it.

On remand, having been directed to accept that the plaintiffs established all three *Gingles* preconditions for a Section 2 vote dilution claim, the district court found based on the totality of the circumstances that Ordinance 122 violated Section 2. *Cottier v. City of Martin*, 466 F.Supp.2d 1175 (D.S.D.2006). The City declined to propose a remedy, asserting that there was no possible remedy for the violation found by the court. The district court considered three remedies proposed by the plaintiffs, and adopted the plaintiffs' Plan C. *Cottier v. City of Martin*, 475 F.Supp.2d 932 (D.S.D.2007). Plan C did not divide the City into aldermanic wards, but rather adopted an at-large voting scheme using cumulative voting. Although the district court concluded in its March 2005 order that it lacked authority to order such a remedy, because it was not authorized by South Dakota law, *see March 2005 Order* at 21 n. 4 (citing *Cane v. Worcester County*, 59 F.3d 165, 1995 WL 371008 (4th Cir.1995) (unpublished), and *Cane v. Worcester County*, 35 F.3d 921 (4th Cir.1994)), the court on remand determined that Plan C was permissible. The court ruled that it was "bound to follow" *dicta* from this court's opinion in *Cottier I*,

445 F.3d at 1123 n. 7, which stated that "[i]f, at the remedy stage, a redistricting of Martin's wards appears unworkable, it appears that [Plan C] would be a viable option." *See* 475 F.Supp.2d at 937.

The City appealed both the finding of a Section 2 violation and the remedy, and a divided panel of this court affirmed. *Cottier v. City of Martin,* 551 F.3d 733 (8th Cir.2008) (*Cottier II*). The court then granted rehearing en banc and vacated the panel opinion in *Cottier II.* The en banc court notified the parties that the court may wish to consider issues decided in *Cottier I,* as well as those briefed in *Cottier II.*

II.

As the case is before the en banc court for the first time, we must first consider the scope of our review. The present appeal arises from the district court's rulings on remand from *Cottier I,* but this does not mean that we are constrained as a matter of law to accept the panel decision in *Cottier I.* The en banc court does not lightly review a prior panel decision in the same case, but we have the power to do so.

When sitting en banc, the court has authority to overrule a prior panel opinion, whether in the same case or in a different case. The en banc court has not considered the questions decided in *Cottier I,* and the law of the case does not preclude our consideration of those issues at this stage. The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided," but it is "not a limit to their power." *Messinger v.*

Anderson, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912); *see Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). The doctrine, moreover, holds less sway with respect to an en banc court that is considering issues previously decided by a three-judge panel. That the court previously denied a petition for rehearing en banc is not controlling, because the decision to deny rehearing en banc is a pure exercise of discretion. It is not a ruling on the merits.

The parties have no justifiable expectation that a denial of rehearing en banc at an interlocutory stage resolves issues for all time. A remand order is not final until the Supreme Court denies certiorari at the end of the case. *See Christianson*, 486 U.S. at 817, 108 S.Ct. 2166 ("A petition for writ of certiorari can expose the entire case to review."); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (holding that a prior dismissal of a writ of certiorari at an interlocutory stage did not establish law of the case or amount to res judicata on the points raised); E. Gressman et al., *Supreme Court Practice* 82-83 (9th ed. 2007) ("The Court can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made at the time to secure review of the interlocutory decree or even though such an attempt was made without success."). The parties likewise must recognize that when the court of appeals declines in its discretion to rehear a case en banc after a panel orders a remand, the court retains authority to rehear the matter en banc at a

subsequent stage of the proceedings.

To the extent that a footnote in *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 376 n. 5 (8th Cir.1993) (en banc), purports to restrict the authority of an en banc court to consider prior panel decisions, we overrule it. *Robertson* cited law of the case principles that constrain a subsequent *three-judge panel*, *see Liberty Mut. Ins. Co. v. Elgin Warehouse & Equip.*, 4 F.3d 567, 573 (8th Cir.1993) (order denying rehearing en banc), and seemed to apply them to an en banc court. We reject this view, and align ourselves instead with the uniform position of the circuits that an en banc court may overrule an erroneous panel opinion filed at an earlier stage of the same case. *See Irving v. United States*, 162 F.3d 154, 161 & n. 7 (1st Cir.1998) (en banc); *Watkins v. U.S. Army*, 875 F.2d 699, 704-05 n. 8 (9th Cir.1989) (en banc); *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1229 n. 3 (6th Cir.1984) (en banc); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 437 n. 9 (2d Cir.1978) (en banc); *In re Cent. R.R. Co. of N.J.*, 485 F.2d 208, 210-11 (3d Cir.1973) (en banc); *see also* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.2 (2d ed.2002).

We conclude that it is appropriate in this case for the en banc court to consider the panel decision in *Cottier I*. For the reasons set forth below, we hold that *Cottier I* erred in reversing the district court's dismissal of the action and remanding for further proceedings on liability and remedy. A federal court order directing a city to redraw its election ward boundaries, or to alter fundamentally its voting

system, raises significant issues of federalism. *See Voinovich v. Quilter*, 507 U.S. 146, 156-57, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). We think it exceptionally important for a federal court to ensure that there is a proven violation of Section 2 before ordering a city in South Dakota to undertake significant changes in its electoral process. Therefore, we will not overlook the error in *Cottier I* and proceed to contemplate an order directing the City of Martin to implement a remedy for a non-existent violation of the Voting Rights Act.[2]

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[2] The dissent, while seeming to accept that the en banc court has discretionary authority to "overrule any panel decision that a majority of the active judges believes was wrongly decided," *post*, at 563 (internal quotation omitted), suggests criteria for the exercise of this "discretion" that would give the en banc court virtually no ability to correct an erroneous panel opinion from an earlier stage of the proceedings. If the en banc court could act only when "factual circumstances have changed," *post*, at 564, then the en banc court would be limited to resolving a different dispute based on different facts. And even if the en banc court should refrain from overruling a prior panel opinion where a party "would be seriously prejudiced as a result," *post*, at 563, a mere showing that one party "functioned with the belief" that it prevailed on issues before the original panel, *post*, at 564, is not sufficient to establish unfair prejudice. If it were, then every case could present such prejudice, and the en banc court's authority to correct an earlier panel decision would be illusory. *Cf. Irving*, 162 F.3d at 162 ("Prejudice to a party, while always regrettable, cannot furnish a viable rationale for overlooking a federal court's lack of power to grant a remedy in the first place.").

III.

A.

In its March 2005 order, the district court considered the three preconditions for a Section 2 vote dilution claim, as described by the Supreme Court in *Gingles:*

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51, 106 S.Ct. 2752 (internal citation omitted).

On the first precondition, the district court found that two illustrative redistricting plans introduced by the plaintiffs showed that the Native American group in the city was sufficiently large and geographically compact to constitute a majority in a single-member district. The court rejected the City's contentions that the majority was not large enough and that it was too fragile. The court also held that the proposed plans were not "so irregular on their face that they appear to be solely an effort to

segregate races for the purposes of voting." Rather, the court credited the testimony of the plaintiffs' expert that he applied "traditional districting principles" to create these illustrative plans, and held that some consideration of race in fashioning the plans did not make them impermissible remedies for a Section 2 violation.

With respect to the second precondition, the court considered statistical analysis presented by experts for both parties concerning elections within the city and outside the city. The court found that three statistical methods employed by one or both experts were reliable, and that the analyses demonstrated political cohesiveness among Indians in Martin. Considering the statistical evidence together with historical evidence and contemporary lay testimony, the court found that the plaintiffs satisfied the second *Gingles* precondition.

Considering the third precondition, however, the district court found that the plaintiffs failed to meet their burden to show that "the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed-usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752 (internal citation omitted). The court first evaluated an exit poll offered by the plaintiffs to show bloc voting in two city council races, but gave no weight to the poll due to shortcomings in its methodology.

The court then considered statistical analysis of election results from jurisdictions outside the city, which the court described as "exogenous" races. The

court divided these exogenous races into several categories and made findings with respect to each. The court found that in countywide elections between candidates of different races, countywide elections between white candidates, and state and federal elections between white candidates, white voters did not vote sufficiently as a bloc usually to defeat the Indian-preferred candidate. In one category, statewide elections between candidates of different races, the court found that white voters did vote sufficiently as a bloc usually to defeat the Indian-preferred candidate. The court reasoned that interracial contests were entitled to more weight than contests among candidates of the same race, and that countywide elections should receive greater weight than state and federal elections. Finding that only one category of exogenous elections showed bloc voting by a white majority to defeat Indian-preferred candidates, the court concluded that the overall statistical evidence did not demonstrate the bloc voting required by *Gingles*.

The court also evaluated the testimony of lay witnesses who said that they could identify Indian-preferred candidates in city council elections, and that those candidates consistently lost. The plaintiffs urged that white bloc voting was the only possible explanation for the defeat of Indian-preferred candidates, but the district court found that the lay testimony did not eliminate other reasons for candidate losses. The court ultimately found that "[i]n light of the overwhelming statistical evidence, this lay testimony is not sufficient to meet plaintiffs' burden of demonstrating the usual defeat of the

Indian-preferred candidate."

Having determined that the plaintiffs failed to satisfy the third *Gingles* precondition, the court entered judgment for the City on the plaintiffs' claim of vote dilution in violation of Section 2. The plaintiffs appealed, and this court filed its opinion in *Cottier I.* We now consider the issues raised in that appeal.

B.

Vote dilution claims are "peculiarly dependent upon the facts of each case," requiring "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles,* 478 U.S. at 79, 106 S.Ct. 2752 (internal quotations omitted). To "preserve[ ] the benefit of the trial court's particular familiarity with the indigenous political reality," *id.,* we apply a "clear error" standard of review both to the predicate factual determinations and to the ultimate finding regarding vote dilution. *Id.; Abrams v. Johnson,* 521 U.S. 74, 91, 93, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). It is the plaintiffs' burden to demonstrate the existence of vote dilution. *Voinovich v. Quilter,* 507 U.S. 146, 155-56, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993).

We conclude that the district court did not commit clear error in finding that the plaintiffs failed to meet the third *Gingles* precondition, *i.e.,* that the white majority in Martin voted sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate in city council elections. We therefore overrule the panel decision in *Cottier I.*

First, the district court did not clearly err in

giving no weight to the 2003 exit poll offered by the plaintiffs to show bloc voting by a white majority in city council elections. The court gave specific and cogent reasons for declining to credit the results of this poll. After observing that exit polls generally are "prone to high nonresponse rates which can seriously bias estimates and distort inferences," *March 2005 Order* at 41, and that "exit poll respondents may lie," *id.*, the court found shortcomings in the specific exit poll conducted in Martin.

The court explained that the plaintiffs' own expert admitted that the exit poll sample "under-represented non-Indians, over-represented Indians, and slightly over-represented females," so that it was "not a representative sample of voters as a whole." *Id.* The court found that the "high nonresponse rates of non-Indians seriously distorted inferences that could be drawn from the exit poll." *Id.* at 42. The court also reasoned that "[a] truly representative poll of the votes actually cast should logically demonstrate some consistency between the responses to the poll and the actual returns," *id.* at 41, but determined that the exit poll offered by the plaintiffs failed to demonstrate such consistency. *Id.* at 41-42. Although it was "troubled by the fact that some of the poll takers were related to one of the plaintiffs," *id.* at 42, the court found it unnecessary to determine whether this fact alone was a sufficient basis to disregard the data.

It was not clear error for the court to view the poll as unreliable evidence of voting behavior by residents of Martin. There were reasonable grounds for the district court to believe that the poll results

understated the number of Indians who favored the non-Indian-preferred candidate, understated the number of white voters who favored the Indian-preferred candidate, and failed to reflect truthful answers of those who responded.

Second, the plaintiffs' challenge to the district court's statistical analysis does not demonstrate clear error. The *Cottier I* panel concluded that the district court improperly relied on statewide and national election results in determining that the plaintiffs failed to meet their burden, but we disagree. Although the district court did use *data* from state and national elections, the district court did not rely on the state and national *outcomes* in tabulating the wins and losses of Indian-preferred candidates. Rather, the district court relied on the precinct-level results for those elections, which were reported by the plaintiffs' expert and cited by the plaintiffs as the election results for the City of Martin.

The city election results derived from exogenous elections do not demonstrate that the district court's overall finding as to the third *Gingles* factor was clearly erroneous. The number of interracial elections presented to the district court was very small. There were only four head-to-head interracial countywide races; one race was non-polarized, and the non-Indian-preferred candidate won the other three in the city. Appellants' App. 555-56. There were only three statewide interracial head-to-head races, and the non-Indian-preferred candidate won those in the city. Appellants' App. 555-56. But there were twenty-five state and federal races with white-only candidates, and the Indian-

preferred candidate won fifteen of those contests in the city. Appellants' App. 573-577. There were three white-only countywide races; one contest was non-polarized, and the Indian-preferred candidate was victorious in one of the other two in the city. Appellants' App. 574-76. These results taken as a whole show almost equal numbers of victories for Indian-preferred candidates and non-Indian-preferred candidates. They do not compel a finding that a white majority in Martin votes sufficiently as a bloc usually to defeat the Indian-preferred candidate. *Cf. Johnson v. Hamrick*, 296 F.3d 1065, 1078 (11th Cir.2002) ("Although we have on various occasions held that district courts deciding [minority] vote dilution claims *may* give more weight to elections involving [minority] candidates than those involving all white contestants, there is no requirement that a district court *must* do so.") (citations omitted).[3]

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[3] The plaintiffs contend on appeal that the district court erred by aggregating election results from four primary contests with results from general election contests. *See Lewis v. Alamance County*, 99 F.3d 600, 616-17 (4th Cir.1996). In the district court, however, their submissions analyzed a 2002 primary election for governor in the midst of several general election contests, and used the primary to support their expert's conclusion that "[c]andidates preferred by Indians in the City of Martin are usually defeated by the non-Indian majority voting as a bloc." Appellants' App. 536-38, 546; R. Doc. 360, ¶¶ 378, 390, 393. The plaintiffs never suggested that they advanced two separate vote dilution challenges based on primary elections and general elections, *see Lewis*, 99 F.3d at 617, and they cannot now challenge the district court's ruling based on an analysis that they invited. *Ark. State Highway Comm'n v. Ark. River Co.*, 271 F.3d 753, 760 (8th Cir.2001). In any event, although the

The district court did, for a subset of elections, rely on *county* election results, rather than city results, but this portion of the analysis does not establish clear error. The results in six of these contests, involving state and federal elections with multiple white candidates, actually favored the plaintiffs, because the Indian-preferred candidates prevailed in only two of the six. Appellants' App. 559-60, 562, 564. Nine other contests in this subset were multi-candidate races in Bennett County that involved both Indian and non-Indian candidates. The plaintiffs' expert proffered these results as part of his analysis of the second *Gingles* precondition, but concluded that it was not possible to include these multi-candidate elections in his statistical analysis of the third precondition. Appellants' App. 531-32. The City's expert replied that the plaintiffs' expert was "dead wrong" that these elections could not be incorporated into the analysis of the third precondition, Appellants' App. 796, but the plaintiffs still submitted no city-level data concerning these elections. The district court evidently agreed with the City's expert that the multi-candidate elections should be considered, and then evaluated the only data available in the record about those elections-*i.e.*, county-level results showing that the Indian-preferred candidates won five of the nine contests. *March 2005 Order* at 55-56; Appellants' App. 547, 549-50. The court's approach was more favorable to

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primary results pointed in both directions, they *favored* the plaintiffs' case with respect to the city-level results that the plaintiffs contend are most probative, because the Indian-preferred candidate lost the gubernatorial primary.

the plaintiffs than if the court had simply counted all nine elections against the plaintiffs based on a failure of proof.[4]

Overall, even if we accord little or no weight to the county results cited by the district court, the statistical evidence on the third *Gingles* precondition is mixed.[5] The district court found insufficient proof,

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[4] We reject the plaintiffs' suggestion that we should take judicial notice of additional data concerning these nine elections based on documents that are appended to the plaintiffs' appellate brief in *Cottier I*. Aside from whether the documents are properly authenticated, we decline through judicial notice to allow one party to augment its evidentiary presentation in a case involving extensive statistics that were the subject of complex analysis by experts for both parties. *See generally United States v. Bregnard*, 951 F.2d 457, 460 n. 2 (1st Cir.1991); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n. 5 (D.C.Cir.1980); *United States v. Campbell*, 351 F.2d 336, 341 (2d Cir.1965); 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 201.32[3][a], at 201-78 to 201-78.1 (Joseph M. McLaughlin ed., 2d ed. 2009) ("Judicial notice should not be used as a device to correct on appeal a failure to present adequate evidence to the trial court.").

[5] We do not accept the plaintiffs' argument that the district court clearly erred by failing to attribute the success of Indian-preferred candidates to "special circumstances" of incumbency and "vote-splitting" by white voters. *See Gingles*, 478 U.S. at 57, 106 S.Ct. 2752. Incumbency is the "least 'special' " of the special circumstances, *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1389 n. 7 (8th Cir.1995), and incumbency "must play an unusually important role" before a court is required to disregard an electoral victory of a minority-preferred candidate. *Clarke v. City of Cincinnati*, 40 F.3d 807, 813-14 (6th Cir.1994). The record does not compel such a finding here, particularly given that the plaintiffs' expert did not even cite the effects of incumbency in his report. Even accepting that "vote-splitting" is a special circumstance that must be given weight, the only two contests cited by the plaintiffs on this point involve county-level results that do not affect our overall conclusion that the statistical evidence is mixed.

based on exogenous elections, that white voters typically vote as a bloc to defeat Indian preferred candidates in the City. The data in the record fall short of demonstrating that this conclusion is clearly erroneous. *See Gingles*, 478 U.S. at 101, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) (concluding that even where the district court clearly erred by aggregating certain data and relying on it to find racial bloc voting, the district court's ultimate conclusion was not clearly erroneous in light of other evidence that the court also considered).

Third, we disagree with the *Cottier I* panel that the district court clearly erred when it declined to consider the results of aldermanic elections from 2002-2004 as evidence of racial bloc voting. Other than the 2003 exit poll that the district court permissibly found unreliable, there was no statistical evidence regarding these elections. The only other evidence about these contests was the testimony of lay witnesses who expressed an opinion about which candidates were preferred by Indian voters, and whether those candidates won or lost. This testimony was disputed. Some witnesses presented by the plaintiffs did not even live in Martin. The defendants introduced testimony from Indian voters who did reside in Martin, and this evidence tended to show that Indians, in fact, have varied opinions on issues of the day and on preferred candidates for elective office. The district court considered the lay testimony, but found that it did not show that Indian-preferred candidates lost because of white bloc voting. The court concluded that in view of the statistical evidence, the testimony was insufficient to

meet the plaintiffs' burden to satisfy the third *Gingles* precondition. This is a factual finding that addresses the relative persuasiveness of disputed lay testimony and statistical evidence unfavorable to the plaintiffs. There is no clear error in the district court's weighing of the evidence.

The record evidence in support of the plaintiffs' case on the third *Gingles* precondition is not so strong as to generate a "definite and firm conviction" that the district court mistakenly dismissed the Section 2 vote dilution claim. *See Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). For the reasons set forth by the district court, we also agree that the evidence is not sufficient to support a finding that Ordinance 122 was adopted and maintained for a discriminatory purpose. We therefore conclude that the district court's judgment of March 22, 2005, should have been affirmed. Because the Section 2 vote dilution claim was properly dismissed based on the third *Gingles* precondition, we need not consider the City's contentions regarding the other *Gingles* preconditions, the district court's analysis of the totality of the circumstances on remand, or the permissibility of any remedies proposed by the plaintiffs. The panel opinion in *Cottier I* is set aside in its entirety, and it should not be treated as binding circuit precedent.

For the foregoing reasons, the district court's judgment of February 9, 2007, is vacated, and the case is remanded with directions to dismiss.

SMITH, Circuit Judge, with whom MURPHY, BYE, and MELLOY, Circuit Judges, join, dissenting.

I respectfully dissent because I conclude that (1) this court should not, under the present circumstances, reconsider *Cottier I* and (2) we should grant the plaintiffs' motion requesting that this court vacate the district court's remedial order and remand to the district court for reconsideration of the appropriate remedy in light of the Supreme Court's recent decision in *Bartlett v. Strickland*, --- U.S. ----, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009).

A. *Reconsideration of* Cottier I

In *Robertson Oil*, this court, sitting en banc, concluded that the court "*should* not" "accept a party's motion for rehearing en banc of a decision after a second remand to open up the entire litigation." 14 F.3d at 376 n. 5 (emphasis added). Specifically, the court observed that

> [t]he dissent's willing acceptance of this opportunity reveals a different view of the principles of the law of the case which a majority of the judges of this court so firmly endorsed in our order denying rehearing en banc in *Liberty Mutual Insurance Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 573 (8th Cir.1993). Indeed, the dissent would take this rehearing of *Robertson III* to vacate *Robertson I*, in which we denied rehearing, and vacate Robertson II, in which we denied rehearing, and remand the case for a new trial.

Id.

The majority is correct that the view expressed in *Robertson Oil* is contrary to the prevailing view among our sister circuits that "[a] ruling by a panel ... does not ... establish the law of the case if a later appeal is heard by the court en banc." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.2 (2d ed.2002). The prevailing view maintains that

> [a] court en banc surely is free to limit the matters it considers en banc, and *may exercise its discretion to refuse reconsideration of some issues resolved by a panel on an earlier appeal.* There is no reason why en banc reconsideration of all issues must follow the determination that one or more issues in a case warrant the grudgingly rationed resource of en banc consideration. All ordinary law-of-the-case concerns supplement this particular concern. Nonetheless, the court en banc has a special authority that supports a special freedom to redetermine important issues without feeling bound in the same way as successive panels.
>
> Should successive appeals in the same case come to be heard by the court en banc, there is force in the view that ordinary law-of-the-case principles should apply. The en banc court, however, has a special authority and

> responsibility for the law of the circuit, and may properly assert an extra measure of freedom to reconsider important issues.

Id. (emphasis added) (footnote omitted).

But even if this court, sitting en banc, possesses the power to "overrule any panel decision that a majority of the active judges believes was wrongly decided," *Van Gemert v. Boeing Co.*, 590 F.2d 433, 437 n. 9 (2d. Cir.1978) (en banc), including in cases where prior en banc review of the panel's decision was previously denied, the relevant question is under what circumstances the court *should* exercise this *discretionary* power.

I respectfully suggest that we *should not* exercise such power if "a party would be seriously prejudiced as a result," *id.*, or if reconsideration of a prior panel's opinion would undermine "stability in the law-a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned," *Lincoln Nat'l Life Ins. Co. v. Roosth,* 306 F.2d 110, 113 (5th Cir.1962). As the Fifth Circuit explained:

> In more tranquil days and times, an appeal from a second trial would be heard by the same Court as the first appeal. Now, that is highly unlikely, and where it occurs, it is-at least in this Court-due entirely to the laws of chance. That puts a premium on multiple appeals. That is so because, without

> implying any improper purpose to litigants or their counsel, or acknowledging anything more than, as human beings, Judges will unavoidably have differences in emphasis, approach, or views on close questions in given areas, if the practice is followed for each succeeding panel to arrive at its own decisions, the losing party on the first appeal will naturally strive to bring it back a second, or a third, or a fourth time until all are exhausted. This possibility involves something other than simply more grist for our mill and as to which we should be indifferent.
>
> * * *
>
> We think that in a multi-Judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally important, the bar who must advise clients or litigants in situations yet to come, will know that *in the absence of most compelling circumstances, the decision on identical questions, once made, will not be re-examined and re-decided merely because of a change in the composition of the Court or of the new panel hearing the case*

Id. at 114 (emphasis added).

In the present case, I conclude that

> nothing about this case warrants our exercising the undoubted power to overrule the prior decision reached by the Court on the first appeal. On the contrary, any effort to re-examine the merits and now declare a result-either the same or a different one-independent of the former decision leads to consequences much more serious to the permanent, objective, administration of justice under law than any supposed individualized injustice to one or all of the litigants.

Id. First, neither party asked this court to reconsider the prior panel decision in *Cottier I;* instead, the en banc court *sua sponte* raised the question.

Second, no factual circumstances have changed since *Cottier I* was decided to justify reconsideration of the panel's opinion; instead, a majority of the court-sitting three years later-would merely apply the law to the *same* facts differently. We should not encourage parties to bring multiple appeals in the same litigation in the hope that the en banc court will overrule long-established prior panel opinions in that litigation. *See Lincoln,* 306 F.2d at 114.

Lastly, reconsideration of *Cottier I* unfairly prejudices plaintiffs. Plaintiffs commenced the instant litigation on April 3, 2002. *Cottier,* 466 F.Supp.2d at 1181. The district court's decision rejecting plaintiffs' claims was entered on March 22, 2005. *See March 2005 Order.* The appeal in *Cottier I* was orally argued on January 9, 2006, and the panel

filed its opinion, as corrected, on May 8, 2006. This court denied rehearing en banc on June 28, 2006. Thus, at the time this case was orally argued to the en banc court on September 23, 2009, over three years elapsed since *Cottier I* was first submitted to this court. During this period of time, plaintiffs have functioned with the belief that they established the City's § 2 liability under the VRA. No compelling circumstances, such as changed facts or law, justify reexamining and redeciding *Cottier I.* Indeed, applying Rule 35(a) of the Federal Rules of Appellate Procedure, this case, at its present posture, neither presents a necessity "to secure or maintain uniformity of the court's decisions" nor "involves a question of exceptional importance."[6]

B. *Motion To Remand*

Even though I would decline to reexamine *Cottier I,* I would not reach the merits of the City's argument that the district court lacked the authority to impose remedial Plan C. Prior to oral argument,

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[6] The majority holds that "*Cottier I* erred in reversing the district court's dismissal of the action and remanding for further proceedings on liability and remedy" and observes that "[a] federal court order directing a city to redraw its election ward boundaries, or to alter fundamentally its voting system, raises significant issues of federalism." *See supra* Part II. Presumably, the majority is attempting to justify its decision to exercise its discretionary power to reconsider the prior panel decision in *Cottier I*-a decision that only addressed the City's *liability*, not the district court's imposition of *remedy* for the violation. But the court need not reopen *Cottier I* to prevent implementation of Plan C, which does alter the City's voting system.

plaintiffs filed a motion requesting that this court vacate the district court's remedial order and remand to the district court for reconsideration of the appropriate remedy in light of the Supreme Court's recent decision in *Bartlett,* in which the Court declared that "the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" 129 S.Ct. at 1245.

According to plaintiffs, the Supreme Court's intervening decision in *Bartlett* alters the law on which the district court's remedial order was premised. They cite to the district court's belief that "[a]n effective majority, and thus an adequate remedy [to a § 2 claim], requires approximately 60 percent minority VAP." *Cottier,* 475 F.Supp.2d at 938 (citing *Jeffers v. Clinton,* 756 F.Supp. 1195, 1198 (E.D.Ark.1990)). Because the district court imposed a 60-percent-minority-VAP requirement, plaintiffs contend that the district court erroneously rejected their proposed Plan A. Plan A provided for three dual-member districts, and its only majority-minority district had an Indian VAP of 54.55 percent. The district court concluded that "Plan A fail [ed] to provide an effective majority because it falls well short of the 60 percent VAP guideline." *Id.* at 938. Plaintiffs also argue that, for the same reason, the district court improperly rejected Plan B, which proposed six single-member districts, with "Ward 1 ... contain[ing] 53.51 percent Indian VAP" and "Ward 2 ... contain[ing] 52.73 percent VAP." *Id.* at 940.

In response, Martin maintains that *Bartlett* only discusses the *liability* stage of a § 2 case; it does

not discuss an *effective remedy* or how a district court should determine remedies to a § 2 violation. According to Martin, *Bartlett* merely determined the minimum size minority group necessary to satisfy the first *Gingles* precondition in the liability phase. In support of its argument, Martin notes that even the dissenting justices in *Bartlett* emphasized that the *Gingles* preconditions do not state the ultimate standard under § 2. The dissent stated that "the threshold population sufficient to provide minority voters with an opportunity to elect their candidates of choice is elastic, and the proportions will likely shift in the future, as they have in the past," citing that some courts use a requisite 65 percent majority-black population to constitute a safe district. *Bartlett,* 129 S.Ct. at 1254 (Souter, J., dissenting).

In this case, the district court applied a per se rule that "[a]n effective majority, and thus an adequate remedy, requires approximately 60 percent minority VAP." *Cottier,* 475 F.Supp.2d at 938. In light of *Bartlett,* I will consider the evolution of this per se rule and its post-*Bartlett* viability.

1. *Pre-*Bartlett *Cases and Origins of the 60/65-percent Rule*

"In cases dealing with minority vote dilution, courts have confronted the question of what level of [minority] population is sufficient to provide the group with a 'realistic opportunity to elect officials of their choice....' " Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice,* 10 Law & Pol'y 43, 45 (1988) (quoting *Kirksey v. Bd. of Supervisors of Hinds County,* 402 F.Supp. 658,

673, 676 (S.D.Miss.1975)). "This percentage has been called the 'effective majority.' " *Id.*

"[A] rule of thumb has evolved that sets a 65 percent minority population as the basis for an effective majority." *Id.* The 65-percent rule was allegedly supported by the Justice Department and "given the imprimatur of the U.S. Supreme Court in United Jewish Organization of *Williamsburgh v. Carey[,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229] (1977)." *Id.* But "[n]either of these assertions is correct." *Id.*

United Jewish Organization involved the Attorney General's preclearance review of a redistricting plan under § 5 of the VRA. In that case, the Supreme Court stated that "[a]t a minimum and by definition, a 'black majority district' must be more than 50% black." 430 U.S. at 162, 97 S.Ct. 996. The Court then determined that "it was reasonable for the Attorney General to conclude in this case that a *substantial* nonwhite population majority-in the vicinity of 65%-would be required to achieve a nonwhite majority of eligible voters." *Id.* at 164, 97 S.Ct. 996. The Court's conclusion was based on its determination that the size of the minority population in the minority districts must reflect "the need to take account of the substantial difference between the nonwhite percentage of the total population in a district and the nonwhite percentage of the voting-age population." *Id.* at 163-64, 97 S.Ct. 996. Thus, the Court held that "the Justice Department had the authority ... to deny preclearance to a plan with insufficient Hispanic concentrations in certain districts in Brooklyn on the

grounds that the plan failed to provide Hispanics an opportunity to elect candidates of their choice." Brace, *supra,* at 45.

Notably, the Court did not "suggest that the 65 percent rule is appropriate in all circumstances. Indeed, there is no discussion [in the case] of the empirical basis for the choice of the 65 percent figure." *Id.; see also* Jack Quinn et al., *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act,* 1 Geo. Mason U. Civ. Rts. L.J. 207, 236 n. 120 (1990) ("The Court [in *United Jewish Organizations*] did not otherwise explain or justify its acceptance of the 65% figure."). Scholars have researched the origins of the 65-percent rule but have not found it in a holding of the Supreme Court.[7]

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[7] "Legend has it that the rule came about because someone in the Justice Department took 50 percent and simply added 5 percent to compensate for the higher proportion of Hispanic noncitizens, 5 percent for lower Hispanic voting age population (VAP), and 5 percent for lower Hispanic registration and turnout." Brace, *supra,* at 45; *see also* Adam J. Chill, *The Fourteenth and Fifteenth Amendments with Respect to the Voting Franchise: A Constitutional Quandary,* 25 Colum. J.L. & Soc. Probs. 645, 659 n. 77 (1992) ("The notion of a minimum 65% minority population has its roots in New York State redistricting efforts. The figure derives from the Justice Department requiring New York State officials to utilize that percentage figure as a condition for obtaining pre-clearance of the 1972 redistricting plan for Kings County. In the ensuing litigation, *United Jewish Orgs. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), the Supreme Court endorsed the use of this figure as establishing compliance with the Voting Rights Act."); Quinn, *supra,* at 236 ("[I]n order to ensure that the new minority district is a 'safe' one, both the Department of

In 1986, the Supreme Court decided *Gingles*, the seminal § 2 VRA case. 478 U.S. at 30, 106 S.Ct. 2752. The Court determined that, to establish a § 2 violation, a plaintiff must prove that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 49, 106 S.Ct. 2752. This test requires plaintiffs to make three separate showings. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S.Ct. 2752.

Justice and the courts have required a higher percentage of minority population than a bare majority.").

But Justice Department officials in the 1980's never "regard[ed] the 65 percent figure as having any special significance." Brace, *supra*, at 45 (citing Brief in Opposition to Writ of Certiorari, *City Council of Chicago v. Ketchum*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) (No. 84-627, at 10) ("[W]e attach no particular significance to a 65% figure."). Instead, "each case is to be investigated in terms of the facts special to it." *Id.* (citing Paul Hancock, U.S. Department of Justice, Voting Rights Section, personal communication, October 1986). In fact, in 1985, the Assistant Attorney General stated that " '[t]here is no 65 percent threshold population figure applied as a rule of thumb by the Department in redistricting matters reviewed under Section 5.' " *James v. City of Sarasota*, 611 F.Supp. 25, 32 (M.D.Fla.1985) (quoting Letter of April 9, 1985, from William Bradford Reynolds, Assistant Attorney General, to the Honorable George C. Carr).

Furthermore, "[c]ontrary to widespread belief ... the Voting Rights Act does not impose a requirement that minority districts contain at least sixty-five percent minority members." Quinn, *supra*, at 236. The statute contains "no fixed numerical requirement." *Id.*

"Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* at 51, 106 S.Ct. 2752. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed, ... to defeat the minority's preferred candidate." *Id.*

Gingles did not explain "what the Court meant by the term 'majority.' It is unclear both as to what percentage Justice Brennan was referring to as being sufficient to constitute a majority for purposes of this test, and who could be included in calculating this figure." Rick Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups-When is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech. L.Rev. 95, 140 (1989). Gingles does not specify whether plaintiffs must show only a bare majority, whether they must show sufficient numbers so as to be able to effectively control a district, or who the court counts in calculating the majority. *Id.* The Court never discussed "whether the plaintiffs are required to constitute a majority of the proposed district's total population, total voting age population, or total registered voters." *Id.* Of course, the "ordinary meaning of majority is fifty percent plus one." *Id.*

Post-*Gingles*, district courts within this circuit expressly applied a 60-percent or 65-percent rule. *See, e.g., Smith v. Clinton*, 687 F.Supp. 1361, 1363

(E.D.Ark.1988) ("A guideline of 65% of total population is frequently used, and is derived by supplementing a simple majority with an additional 5% to offset the fact that minority population tends to be younger than that of whites, 5% for the well-documented pattern of low voter registration, and 5% for low voter turnout among minorities. When voting-age population figures are used, a 60% nonwhite majority is appropriate."); *Jeffers*, 756 F.Supp. at 1198 ("It was just this reasoning that led this Court, less than two years ago, to hold unanimously that something on the order of a 60% BVAP is required to remedy a vote-dilution violation of the Voting Rights Act."). And this court recognized that " '[h]istorically disadvantaged minorities require more than a simple majority in a voting district in order to have ... a practical opportunity to elect candidates of their choice.' " *Whitfield v. Democratic Party of Ark.*, 890 F.2d 1423, 1428 (8th Cir.1989) (quoting *Smith*, 687 F.Supp. at 1362).

Nevertheless, "by 1990, the 65% rule was considered exceptional." Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L.Rev. 1517, 1527 (2002). "As one of the leading analyses concluded in the mid-1990s, districts with 55% [minority] populations were generally sufficient to enable [minority] voters to defeat racial bloc voting, while districts less than 45% [minority] almost never elected [minority] representatives." *Id.* (citing David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 46-47 (1997)). And, the Department of Justice

"expressly disclaimed any reliance on a sixty-five percent standard." Quinn, *supra,* at 239. On November 17, 1990, the chief of the Voting Section of the Civil Rights Division stated:

> "Let me also take this opportunity to give you the Department of Justice's position on the so-called '65% Rule,' i.e., whether a minority district must be at least 65% in order to satisfy Department of Justice requirements. *We attach no particular significance to a 65% figure.* The Department has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population significantly less than 65% (and even 50%) of the total may be entitled to Section 5 preclearance. We have also rejected plans where the minority percentage in a district exceeded 65%. *Each Section 5 submission must be evaluated in light of the particular factual circumstances-not on the basis of some preordained population percentage.*"

Id. (quoting Remarks of J. Gerald Hebert, Acting Chief, Voting Section, Civil Rights Division, Department of Justice at Conference on Fair Redistricting in Texas (Nov. 17, 1990)) (emphasis added by Quinn).

Despite the trend away from the 65-percent rule in the 1990s, in our most recent case regarding § 2 of the VRA, we continued to apply 65 percent as a

"guideline." *Bone Shirt v. Hazeltine,* 461 F.3d 1011, 1023 (8th Cir.2006). In *Bone Shirt,* we upheld the remedial plan adopted by the district court, finding that the plan "assures Native-American voters the opportunity to elect representatives of their choice and meaningful participation in the political process." *Id.* We concluded that "the remedial plan affords Native-Americans more than a 65 percent majority in District 27 and a 74 percent majority in District 26A." *Id.* In support of this holding, we cited *Ketchum v. Byrne,* 740 F.2d 1398, 1402 (7th Cir.1984), as acknowledging the 65-percent guideline and *Neal v. Coleburn,* 689 F.Supp. 1426, 1438 (E.D.Va.1988), for the following proposition: " '[T]he general 65% guideline for remedial districts is not a required minimum which the plaintiffs must meet before they can be awarded any relief under § 2.... Rather, the 65% standard is a flexible and practical guideline to consider in fashioning relief for a § 2 violation.' " *Id.* We also found that the district court "correctly considered other factors, including turnout rate and incumbency in formulating the plan." *Id.* (holding that "all that is required [under § 2] is that the remedy afford Native-Americans a realistic opportunity to elect representatives of their choice").

2. Bartlett v. Strickland

Did the Supreme Court's decision in *Bartlett* modify what constitutes an "effective majority" for purposes of § 2? I conclude that it does. The case arose "in a somewhat unusual posture" in which the State of North Carolina invoked § 2 as a *defense* to a new district that it created. *Bartlett,* 129 S.Ct. at 1239. According to the State, "§ 2 required [it] to

draw the district in question in a particular way," despite a provision of the North Carolina Constitution that prohibited the state legislature from "dividing counties when drawing legislative districts for the State House and Senate." *Id.* The Court granted certiorari to determine

> whether [§ 2] can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn. To use election-law terminology: In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?

Id. at 1238. Ultimately, the Court held that such "crossover districts" do not satisfy the Gingles requirement that the minority population be large enough and yet sufficiently geographically compact to constitute a majority in a single-member district. *Id.* at 1243.

In reaching this holding, the Court began its analysis by noting that the case "turn[ed] on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district." *Id.* at 1241. The "dispositive question" was

"[w]hat size minority group is sufficient to satisfy the first *Gingles* requirement?" *Id.* at 1242. The Court observed that

> [a]t the outset the answer might not appear difficult to reach, for the *Gingles* Court said the minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S., at 50, 106 S.Ct. 2752, 92 L.Ed.2d 25. This would seem to end the matter, as it indicates the minority group must demonstrate it can constitute "a majority." But in *Gingles* and again in *Growe [v. Emison,* 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993),] the Court reserved what it considered to be a separate question-whether, "when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." *Growe, supra,* at 41, n. 5, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388; *see also Gingles, supra,* at 46-47, n. 12, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25. The Court has since applied the *Gingles* requirements in § 2 cases *but has declined to decide the minimum size*

> *minority group necessary to satisfy the first requirement. See Voinovich v. Quilter,* 507 U.S. 146, 154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *[Johnson v.] De Grandy,* [512 U.S. 997, 1009, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)]; *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 443, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (opinion of KENNEDY, J.) (*LULAC*). *We must consider the minimum-size question in this case.*

Id. (emphasis added).

In rejecting the State's argument that § 2 *required* the creation of crossover districts, the Court explained that permitting such claims

> would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence. Mandatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates. It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate.

Id. at 1244.

The Court "f[ou]nd support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration" because such a "rule draws clear lines for courts and legislatures alike." *Id.* "Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: *Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?* " *Id.* at 1245 (emphasis added). According to the Court, such a rule gives courts and officials charged with redistricting "straightforward guidance" as to what § 2 requires. *Id.*

> Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then-assuming the other *Gingles* factors are also satisfied-denial of the opportunity to elect a candidate of choice is a present and discernible wrong that is not subject to the high degree of speculation and prediction attendant upon the analysis of crossover claims. Not an arbitrary invention, the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means it is a special wrong

> *when a minority group has 50 percent or more of the voting population* and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.

Id. (emphasis added). Thus, the Court determined that it "remain[ed] the rule ... that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district *is greater than 50 percent.*" *Id.* at 1246 (emphasis added). "The majority-minority rule ... is not at odds with § 2's totality-of-the-circumstances test" because "the *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation." *Id.* at 1247. According to the Court, "*De Grandy* confirmed 'the error of treating the three *Gingles* conditions as exhausting the inquiry required by § 2.' " *Id.* (quoting *De Grandy,* 512 U.S. at 1013, 114 S.Ct. 2647).

3. *Effect of* Bartlett *on Remedial Phase of § 2 Litigation*

Admittedly, *Bartlett* concerned only the *liability* stage of a § 2 case, not the *remedial* stage. The question is whether *Bartlett*'s clarification of the minimum size minority group necessary to satisfy the first threshold *Gingles* requirement impacts what constitutes an "effective majority" in fashioning a remedy for a § 2 violation.

I find *Bartlett* instructive to the present case

for two reasons. First, although the Court in *Gingles* and its progeny never definitively stated the minimum size minority group necessary for purposes of a § 2 vote-dilution claim, the Court in *Bartlett* did establish a numerical threshold and defined the term "majority." The Court stated that, under the first *Gingles* factor, "the majority-minority rule" provides that a minority group must "make up *more than 50 percent* of the voting-age population in the relevant geographic area." *See Bartlett,* 129 S.Ct. at 1245 (emphasis added). Thus, "a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is *greater than 50 percent.*" *Id.* at 1246 (emphasis added).

Second, *Bartlett*'s explanation of the majority-minority rule with regard to liability directly affects the imposition of a § 2 remedy, as issues of liability and remedy are inextricably intertwined. *See, e.g., Nipper v. Smith,* 39 F.3d 1494, 1530-31 (11th Cir.1994) (en banc) ("The inquiries into remedy and liability ... cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system."); *accord Sanchez v. State of Colo.,* 97 F.3d 1303, 1311 (10th Cir.1996).

In addition to *Bartlett,* the per se 60-percent rule that the district court applied in the present case finds no reasoned basis in case law[8] or statutory

[8] Although we previously approved 65 percent as a "guideline," *see, e.g., Bone Shirt,* 461 F.3d at 1023, we have never suggested that such a guideline constitutes a per se rule that applies in all

law, apart from the Court's approval as "reasonable" the Attorney General's decision that "a *substantial* nonwhite population majority-in the vicinity of 65%-would be required to achieve a nonwhite majority of eligible voters." *United States Jewish Organization*, 430 U.S. at 164, 97 S.Ct. 996. "[T]he 65% benchmark is an artificial one because it does not necessarily reflect a minority group's true potential to control a district." Angelo N. Ancheta & Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L.Rev. 815, 867 (1993).

Therefore, in light of the 50-percent numerical threshold requirement in *Bartlett*, the interrelation between remedy and liability, and the lack of reasoned authority for imposing a 60-percent or 65-percent per se rule, I would remand to the district court for reconsideration of plaintiffs' Plan A and Plan B. I would direct the district court to gather any additional statistical evidence, evaluate such evidence, and conduct a particularized inquiry to determine what percentage of minority voters is necessary to provide such voters with a reasonable opportunity to elect a representative of their choice. In conducting this inquiry, I would advise the district court to remain mindful that liability and remedy are inextricably intertwined. While 60 to 65 percent may, in some cases, constitute a sufficient minority population, it does not necessarily follow that such percentages also constitute the *minimum* sufficient

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circumstances in formulating a remedy for § 2 violations.

percentage in every case. Under *Bartlett*, a minority need only make up "more than *50 percent* of the voting-age population in the relevant geographic area" to satisfy the first *Gingles* factor. 129 S.Ct. at 1245 (emphasis added).

C. *Conclusion*

Accordingly, I would grant plaintiffs' motion to vacate the district court's remedial order and remand to the district court for reconsideration of a proper remedy in accordance with the foregoing instructions.

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973:

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b

(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may beconsidered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

No. 10-335

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In The

Supreme Court of the United States

PEARL COTTIER; REBECCA THREE STARS,

Petitioners,

v.

CITY OF MARTIN; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

I. Does the en banc decision present an important question of appellate jurisdiction that calls for this Court's supervisory powers?

II. Is this case moot?

III. Did the Eighth Circuit reject non-statistical evidence and is it therefore in conflict with other circuits?

IV. Is the en banc court's analysis of non-municipal elections in conflict with other cases, and did petitioners invite alleged error by vigorously persuading the district court to determine city voting behavior based on non-municipal election results?

PARTIES TO THE PROCEEDING

Respondents agree with petitioners' listing of the parties to the proceeding, except the current city finance officer is Jean Kirk.

RULE 29.6 STATEMENT

A corporate disclosure statement is not required from the respondents because the City of Martin, Toni L. Ruff, Jean Kirk, David L. Bakley, Gregg A. Claussen, Charles J. Gotheridge, Shirley J. McCue, Cecelia Moffett, and Sherry J. Peck are governmental parties, and are not required to submit a Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1(a).

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STATEMENT

The City of Martin is an aldermanic form of government under South Dakota statute. S.D.C.L. Ch. 9-8. According to statute, each ward must consist of two alderman, to be elected in staggered terms. S.D.C.L. § 9-8-4.

Following the 2000 decennial census, the city redistricted its three voting wards using the new census data by passing Ordinance 122. This ordinance did not create only one precinct in each of the three aldermanic wards as plaintiffs allege. Rather, state statute requires, and therefore the city wards have always been, three in number with two aldermen from each ward. S.D.C.L. § 9-8-4. There is no evidence whatsoever that the passage of Ordinance 122 is what precluded experts from statistically analyzing city election data, as petitioners purport. Pet. 5.

The City of Martin is extremely well-integrated, in that Indians and whites intermarry, live on the same block, and work amongst each other daily. Trial Transcript 1395-96; 1794-1800; 1986.[1] Native Americans serve on city council and in numerous city employment positions. Trial Tr. Ex. 448; 972; Ex. 449; 974; Ex. 450; 975; 1050-1056; 1615; 1395; Ex. 448, pp. 26-37; 1054; 2126-2127. Native Americans own businesses in Martin, run for office, are elected to office,

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[1] Trial Transcript ("Trial Tr.") refers to Docket Entries 346-356; entered 8/18/2004.

and participate in all aspects of life in the city. Trial Tr. 1797-1800. It is not uncommon for an Indian candidate to run unopposed for city council, or for two Indians to run against one another without a white contender. Trial Tr. 1068. It is also common for the city council to appoint an Indian to a vacancy on the council.

The ACLU, on behalf of two Indian voters from the City of Martin, brought suit against the city alleging that the city's redistricting plan, Ordinance 122, violated § 2 of the Voting Rights Act and Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.* at 18-24; Pet. 4. An 11-day bench trial was held on the plaintiffs' claims in June and July 2004. *Id.* at 98-123.

While city politics and city residents see little to no racial animus, a small number of Indian activists living on reservation land testified to their perceived racial animus in the city. Trial testimony produced a marked difference in perspectives between the handful of Indian activists on reservation land as opposed to Indian people residing in Martin. Indian activists on reservation land testified to white bloc voting and "Indian issues," whereas Indians in Martin did not agree with the activist mentality, the activists' "Indian issues," or white bloc voting. Trial Tr. 249:24-250:4; 253-254; 258-259; 269-270; 567:10-22; 607:16-22; 1403-1404; 1580-1581; 1618; 1693; 1801-1803; 1988; 2064:8-2067:21; 2104.

Only one of plaintiffs' five Indian activist witnesses (lead plaintiff Pearl Cottier) who testified about city white bloc voting actually lived in Martin and could vote in city elections. The remaining 4 plaintiffs' witnesses lived on reservation land and speculated on how they thought city residents voted in city elections.

The trial court and en banc court found more credibility and persuasiveness in the testimony of the many city residents, both Indian and white alike, who testified that Indians did not have a preferred candidate in the nonpartisan city elections. Rather, city residents testified that Indians differed on city politics and city candidates, sometimes agreeing but often disagreeing with the candidates espoused by the outside Indian activist group the LaCreek District Civil Rights Committee, members of which served as plaintiffs' five witnesses.

Plaintiffs often argue that defendants' expert, Dr. Ronald Weber, analyzed the same elections using the same techniques and found similar results. Plaintiffs always fail to mention that Dr. Weber was adamantly opposed to the plaintiffs' method of using ecological inference ("EI") in a manner never used before in a voting rights case or in any other manner for any purpose. Trial Tr. 712-13; 716; 722; 1013; 1029-32; 1308-1310; 1315; 1321-22. Dr. Weber ran his own EI calculations in the same manner as did plaintiffs' expert, Dr. Stephen Cole, in order to see if such results could be replicated. Dr. Weber was very clear – he did not use EI in order to proclaim any results he

found as valid, relevant, or reliable. Trial Tr. 1233. Dr. Weber strongly advocated that the trial court not use either expert's EI data as the methodology was untested, not peer reviewed, not published, not accepted in the scientific community, and the results very frequently produced impossibilities (e.g., cohesion over 100%). On some occasions, Dr. Weber's and Dr. Cole's results were wildly inconsistent. For example, Dr. Cole found the Indian-preferred candidate for the 1998 U.S. House contest to be Republican candidate John Thune, at a cohesion level of 71%. Dr. Weber's simulation of this EI method found Democrat candidate Jeff Moser to be the Indian-preferred candidate with a cohesion rate of 86%. Pet. App. 71a. This Court should not use plaintiffs' misrepresentations about Dr. Weber's testimony to buttress Dr. Cole's EI results, as the record is replete with Dr. Weber's criticism of EI and its downfalls when used in this manner. In addition, Dr. Cole testified that he was not an expert in EI a year after conducting EI in this case. Trial Tr. 712-713; Pet. App. 40a. Despite a *Daubert* motion and a great deal of expert criticism of Dr. Cole's use of EI, plaintiffs strenuously fought for its acceptance by the trial court.

Plaintiffs also proffered exit poll results, conducted by Dr. Cole. The evidence reflected numerous methodological problems with Dr. Cole's work. Trial Tr. 1065-1068; 1849-1851. Pet. App. 43a-44a. Numerous witnesses testified regarding the lead plaintiff's relatives serving as the exit poll workers, who only invited certain individuals, mostly Indians, to

participate in the poll. Word had gotten out around town that the exit poll was being conducted by the plaintiffs for use in this case. Trial Tr. 1849-1851. While expert testimony confirmed case law holdings that exit poll returns should mimic actual results, Dr. Cole's results predicted the loser as being the winner of each contest. Pet. App. 43a-44a. Testimony further confirmed case law holdings that high non-response rates can seriously distort inferences. Pet. App. 43a-44a.

Following extensive post-trial briefing and submissions, the district court issued a Memorandum Opinion and Order on March 22, 2005. The district court found that Ordinance 122 did not violate § 2 of the Voting Rights Act because the white majority did not vote sufficiently as a bloc to usually defeat Indian-preferred candidates, a precondition for liability under *Thornburg v. Gingles*, 478 U.S. 30 (1986). Appellants' Addendum 74. Pet. App. 1a. The district court also found that the evidence did not support the plaintiffs' claim that Ordinance 122 was adopted and was being maintained for a discriminatory purpose in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. *Id.* at 75-78.

The plaintiffs filed Notice of Appeal from the district court's judgment on March 24, 2005. Appellants' Sep. App. 246. Petition p. 10. A divided panel reversed the district court's finding under the third precondition of *Gingles*. The Eighth Circuit remanded to the district court, instructing it to determine whether the plaintiffs met their burden under the

totality of the circumstances. If liability was found, the district court was instructed to adopt a remedial plan to cure the Voting Rights Act violation. The city petitioned for a hearing en banc, with five of the eleven judges voting to grant a hearing en banc.

On remand, the district court found for the plaintiffs under a totality of the circumstances determination, and ordered the city to propose a remedial plan. The city declined to propose such a remedy, contending that there was no legally permissible or feasible remedy available. Plaintiffs proposed two redistricting plans and an at-large, cumulative voting scheme as the remedy. The district court found that there was no redistricting plan capable of correcting the violation, and therefore adopted an at-large, cumulative voting scheme for city elections. The district court had initially determined it lacked the authority to create such a remedy, citing *Cane v. Worcester County*, 59 F.3d 165 (4th Cir. 1995) (unpublished), and *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994), as it violated numerous state statutes to create such a hybrid species of municipality. On remand, the district court relied on dicta in *Cottier I*, footnote for authority to adopt the at-large, cumulative voting scheme. *Cottier v. City of Martin* ("*Cottier I*"), 445 F.3d 1113, 1123, n.7 (8th Cir. 2006). The district court stated that it was bound to follow the *Cottier I* footnote, which the *Cottier II* three-judge panel and the subsequent en banc panel stated was in fact dicta. *Cottier v. City of Martin* ("*Cottier II*"), 551 F.3d 733 (8th Cir. 2008); Pet. App. 158a-159a.

The city appealed the finding of liability and the imposed remedy. A divided three-judge Eighth Circuit Court of Appeals panel affirmed the district court. *Cottier II*. The city again petitioned for hearing en banc, which the en banc court granted, and vacated *Cottier II*. The en banc court then notified both parties that the court would consider issues in *Cottier I* as well as the issues presented in *Cottier II*. Plaintiffs filed no motion or brief in opposition to the en banc court's notice that *Cottier I* would also be considered by the en banc court.

Neither did plaintiffs oppose the en banc court's choice or ability to review *Cottier I* at oral argument. The following occurred at oral argument en banc:

> Justice Colloton: Before you do that, may I just ask one other question about *Cottier I*?
>
> Do you see any procedural rule that would preclude this Court in the en banc proceeding from going back and revisiting the holding that Judge Schreier was clearly erroneous in finding no liability? I understand on the merits obviously you think the district court was clearly erroneous, but do you see any procedural obstacle to the Court revisiting that if it were so inclined?
>
> Sells: Your honor, I have not been able to find a case that says that. There is one case, I think it's out of the Ninth Circuit, that says en banc court can do whatever it wants, I think that's probably right.

September 23, 2009 Oral Argument at 39:36 available at http://8cc-www.ca8.uscourts.gov/OAaudio/2009/9/071628eb.asx (last visited October 7, 2010).

The en banc court, in a 7 to 4 decision, affirmed the district court's initial determination, finding that plaintiffs had not met their burden under the third prong of *Gingles*. The en banc court found no clear error in the trial court's weighing of the evidence. The en banc court also affirmed the trial court's finding that Ordinance 122 was not adopted or maintained for a discriminatory purpose.

REASONS FOR DENYING THE PETITION

I. Contrary to Petitioners' Urging, the En Banc Decision Does Not Present an Important Question of Appellate Jurisdiction That Calls for This Court's Supervisory Powers.

Plaintiffs cite Sup. Ct. R. 10(a) and (c) for reasons to grant their petition for writ of certiorari, apparently arguing the en banc Eighth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." As neither reason cited by Plaintiffs exists in this matter, writ of certiorari should not be granted.

A. *Cottier I* was properly before the en banc court as a court sitting en banc has the power to consider previous issues.

It is well-settled that the law of the case doctrine does not prevent an en banc court from reconsidering issues previously decided by a panel court. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *Remington v. Central Pacific R.R. Co.*, 198 U.S. 95, 100 (1905).

"Although courts are eager to avoid reconsideration of questions once decided in the same proceeding, *it is clear that all federal courts retain power to reconsider if they wish.*" 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (2d ed. 2002) (emphasis added). The circuits are in accord. See, *e.g.*, *Irving v. United States*, 162 F.3d 154, 161 (1st Cir. 1998) (en banc) ("We hold that neither the law of the case doctrine nor the law of the circuit doctrine disables an en banc court from overruling a panel decision from a prior appeal in the same case."); *Watkins v. U.S. Army*, 875 F.2d 699, 705 n.8 (9th Cir. 1989) (en banc) ("The law of the case doctrine does not, as the Army suggests, prevent us from reconsidering the issues raised in *Watkins I*."); *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (en banc) ("The law of the case doctrine . . . does not impair the power of an en banc court to overrule any panel decision."); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 436 n.9 (2d Cir. 1978) (en banc)

("[law of the case doctrine] cannot immunize panel decisions from review by the court en banc."); *In re Cent. R.R. Co. of N.J.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (en banc) ("it has long been the rule in this Circuit that decisions made in similar cases by panels of this Court are binding on other panels but are not controlling on the Court En Banc.").

Plaintiffs conceded at oral argument that nothing prevents the court sitting en banc from re-determining prior issues. Plaintiffs did not object in any manner when the en banc court indicated it would consider *Cottier I*. There is no authority of which respondents are aware or that petitioners have cited that states an en banc court *cannot* revisit prior panel decisions. Despite their unambiguous concession at oral argument, and failing to object at any point, petitioners now argue the en banc review of the prior panel ruling was inappropriate because neither party requested review and the Court of Appeals did not justify its review on additional criteria.

An en banc court most certainly can revisit previous issues *sua sponte* without requests from the parties. See *In re Byrd*, 269 F.3d 585, 592-93 (6th Cir. 2001) (Cole, J., concurring) ("The power of an en banc court to review its own panel decisions *sua sponte* is inherent to its function as a reviewing court.") Holding otherwise would prevent a court from correcting its own errors simply because neither side thought to challenge them. This would not be in keeping with the spirit of the rule. See *Irving*, 162 F.3d at 161 ("The authority to overrule the decision of

a prior panel in the same case flows logically from the error-correcting function of the full court.")

Further, there is no requirement limiting en banc review of previous panel decisions to situations where there is a change in the facts, a change in the law, or a need to secure or maintain the uniformity of the circuit's decisions. As the majority points out in *Cottier II*, such criteria would give an en banc court virtually no ability to correct a panel's previous error. *Cottier v. City of Martin* ("*Cottier II*"), 604 F.3d 553, 557 n.2 (8th Cir. 2010) (en banc).

B. No jurisdictional issue exists warranting a grant of writ of certiorari

Petitioners next claim the en banc court did not have *jurisdiction* to review the panel court's prior decision because the district court's original finding did not "merge" into its final judgment. Petitioners' reliance on the final judgment rule is entirely misplaced. Whether or not the district court's original finding merged into its final judgment is completely irrelevant because the district court's original finding – that the third *Gingles* precondition had not been met – most certainly is a final decision capable of review by an en banc court under 28 U.S.C. § 1291. Moreover, while it is well settled that appeals may be taken only on final decisions, there is absolutely nothing in 28 U.S.C. § 1291 preventing a court en banc from reviewing previously decided issues.

Petitioners' citation to *Ortiz v. Jordan*, 316 Fed. Appx. 449 (6th Cir. 2009), *cert. granted*, 130 S.Ct.

2371 (Apr. 26, 2010) is irrelevant, because the *Cottier* case does not concern whether a party must seek interlocutory appeal on a summary judgment denial regarding qualified immunity lest they be precluded from appealing the issue after trial.

C. The en banc court's reversal of *Cottier I* was not inconsistent with this Court's precedent

Finally, petitioners argue the writ of certiorari should be granted because the en banc court did not use the clearly erroneous standard when reviewing *Cottier I*. Petitioners complain that the en banc court set aside the district court's ultimate finding of vote dilution without determing that the ultimate finding was clearly erroneous. Petitioners misunderstand the decision in *Cottier II*. The en banc court revisited *Cottier I* and found that the district court was not clearly erroneous in its finding that the third *Gingles* precondition was not met. The en banc court did not reach the issue of whether the district court's ultimate finding was clearly erroneous because it "would not overlook the error in *Cottier I* and proceed to contemplate an order directing the City of Martin to implement a remedy for a non-existent violation of the Voting Rights Act." *Cottier II*, 604 F.3d at 557.

The en banc court's decision is not inconsistent with Fed. R. Civ. P. 52(a) as the en banc court did not set aside the district court's ultimate finding without using the clearly erroneous standard of

review – it did not even address the district court's ultimate finding. Rather, the en banc court revisited the panel court's prior ruling, which it is entirely at liberty to do, and found the district court was not clearly erroneous in finding the third *Gingles* pre-condition was not met.

There is no jurisdictional issue or a departure so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Nor have petitioners shown the en banc court's decision conflicts in any way with relevant decisions of this Court. In fact, petitioners fail to cite any United States Supreme Court case law on the subject. Accordingly, the petition should be denied.

II. This Case Is Moot

Petitioners request this Court overturn the en banc decision regarding the City of Martin districting plan for this decade ending in December 2010. This decade has nearly expired, and the next decade's census data has already been compiled and is set for release in March 2011. The next City of Martin council election will be held in the spring of 2011, likely June. The new census data released for the new decade will be utilized in redistricting the City of Martin's voting wards for use in all future city council elections. Further determinations of this case cannot affect any future elections. This appeal is moot.

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Schanou v. Lancaster County Sch. Dist.*, 62 F.3d 1040, 1043 (8th Cir. 1995) (quoting *Render v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 540 (1986)). Article III requires a "case or controversy" to exist at every stage in the litigation before the court can reach the merits of a case. *Alvarez v. Smith*, 130 S.Ct. 576, 580 (2009). A "case or controversy" requires "a definite and concrete controversy involving legal interests at every stage in the litigation." *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992). "Occasionally, due to the passage of time or a change in circumstances, the issues presented in a case will no longer be 'live' or the parties will no longer have a legally cognizable interest in the outcome of the litigation." *Arkansas AFL-CIO v. Federal Communications Comm'n*, 11 F.3d 1430, 1435 (8th Cir. 1993). Where a case "is no longer embedded in any actual controversy about the plaintiff's particular legal rights," but rather, "it is an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other [ ] citizens," the case is no longer "live" *Alvarez*, at 580-81.

In a similar case, the State of Alabama was sued at the end of the last decade, in which the plaintiffs asked the supreme court of the state to modify a redistricting plan. *Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1999). The Alabama Supreme Court found that

the plaintiff's request for modification of a 1993 consent judgment redistricting plan, based on the 1990 federal census, was moot. *Id.* The court found that any modification of the current plan could not affect future legislative elections, as the 2000 federal census was scheduled to be released prior to the next legislative election. *Id.* Similarly, this Court must conclude that Martin city elections held in the spring of 2011 and subsequent years will be governed not by Ordinance 122 or 2000 census data, but by a new districting plan based on 2010 federal census data. See *Rice*, 732 So.2d at 993-994.

In a recent case, the Fifth Circuit held in accord. *Lopez v. City of Houston*, ___F.3d ___, 2010 WL 3341643 (5th Cir. 2010). The *Lopez* court found that voters' claims were moot, in that the impending 2010 census would prompt the City of Houston to add seats to its council. *Id.* at *3. The *Lopez* court found that the claim could not be saved from mootness because it was "capable of repetition yet evading review." *Id.* at *2. The exception to the mootness doctrine has two prongs: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*, citing *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). The second prong requires, however, that the party invoking jurisdiction show a "demonstrated probability" or "reasonable expectation" not merely a "theoretical possibility" that it will be subject to the

same government action. *Lopez* at *2, citing *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). The *Lopez* court found that the city had not formed a policy that it will follow in future similar circumstances that are likely to repeat. *Lopez* at *3. The *Lopez* court found that the decennial U.S. census will report the population of the city before the next city election, pursuant to 13 U.S.C. § 141(a) (requiring census figures to be released no later than April 1, 2011). *Id.* Merely demonstrating that city government will "have an opportunity to act in the same allegedly unlawful manner in the future" was not enough to satisfy the second prong of the exception absent a reasonable expectation that the government *will* act in that manner. *Id.*, citing *Libertarian Party,* 595 F.3d at 217. The *Lopez* court found the voters' claims moot, and dismissed the action. *Id.*

No future Martin city elections will be held under Ordinance 122. Petitioners' claim has become moot. The writ of certiorari should not be granted prompting further litigation of a moot issue.

III. The Eighth Circuit Did Not Reject Non-statistical Evidence and Therefore Is Not in Conflict With Any Other Circuit or Court.

The en banc court granted judgment in favor of the City of Martin because the plaintiffs had failed to carry their burden of proof on the third element of a § 2 voting rights claim – whether the white majority

"votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate." Appellants' Addendum 51-75. See *Thornburg v. Gingles*, 478 U.S. 30, 51, 106 S.Ct. 2752, 2763, 92 L.Ed.2d 25 (1986). Plaintiffs argue that the en banc court erred by categorically rejecting lay-witness testimony, rather holding that only statistical evidence can prove the third *Gingles* prong. The en banc court's opinion makes clear, however, that it gave plaintiffs' evidence due consideration and simply found it to be disputed by more reliable and credible lay-witness testimony and overshadowed by statistical evidence. Nowhere in the en banc's opinion does it conclude that statistical evidence is required as plaintiffs contend.

To ascertain the existence of white bloc voting in a particular contest, the district court must determine: (1) the candidate who the minority voters preferred; and (2) whether whites voted as a bloc to defeat the minority-preferred candidate. *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000). The inquiry generally focuses on statistical evidence to discern the way voters voted. *Gingles*, 478 U.S. at 57, 106 S.Ct. at 2769.

Plaintiffs' expert opined and plaintiffs concede that statistical analysis of Martin city elections (mayor and city council elections) is not reliable due to the small number of precincts within the city and because none of the three wards is racially homogeneous. Appellants' Sep. App. 530, Appellants' Brief 35 (*Cottier I*). See also Appellants' Addendum 27 (*Cottier I*) (district court agrees with plaintiffs' expert

that "City of Martin endogenous election data cannot be analyzed in a scientifically valid manner using [various statistical methodologies]."). Because plaintiffs were unable to use statistical evidence from city elections in an effort to prove the third *Gingles* factor, plaintiffs attempted to meet their burden of proof using lay-witness testimony, expert witness analysis of other elections, documentary evidence and the results of an exit poll. Appellants' Brief 35. There is substantial discussion of such evidence in the district court's Memorandum Opinion and Order as well as the en banc decision. Appellants' Addendum 43-48, Pet. App. 165a, 168a-170a.

Plaintiffs' claim their lay-witness testimony, which purportedly identified who the Indian-preferred candidates were in Martin city elections, was undisputed. Quite to the contrary, defendants supplied significant lay-witness testimony which disputed whether Indians in Martin had a preferred candidate at all, and if so, which candidate that was. The en banc court stated the following:

> Other than the 2003 exit poll that the district court permissibly found unreliable, there was no statistical evidence regarding these elections. The only other evidence about these contests was the testimony of lay witnesses who expressed an opinion about which candidates were preferred by Indian voters, and whether those candidates won or lost. This testimony was disputed. Some witnesses presented by the plaintiffs did not even live in Martin. The defendants introduced

> testimony from Indian voters who did reside in Martin, and this evidence tended to show that Indians, in fact, have varied opinions on the issues of the day and on preferred candidates for elective office. The district court considered the lay testimony, but found that it did not show that Indian-preferred candidates lost because of white bloc voting. The court concluded that in view of the statistical evidence, the testimony was insufficient to meet the plaintiffs' burden to satisfy the third *Gingles* precondition. This is a factual finding that addresses the relative persuasiveness of disputed lay testimony and statistical evidence unfavorable to the plaintiffs. There is no clear error in the district court's weighing of the evidence.

Pet. App. 172a-173a.

The record buttresses the en banc court's findings. The city introduced lay testimony from Indians living within the City of Martin demonstrating that Indians disagree on a wide variety of political issues, including which candidates were the Indian-preferred candidates, or even whether there were Indian-preferred candidates in nonpartisan city elections. Trial Tr. 2094:20-21; 2095:12-13; 2102:19; 2106:12; 1403-04; 1569:12-24; 1520:16-20; 1574:18; 1580-81; 1585:18; 1801:9-10, 18-19; 1295-1808; 1614:22-25; 1615:2-3; 1618; 1620:2; 1623:12; 1632; 1634-35; 1690:1-4; 1691:12; 1693; 1694:4; 1797-98; 1801-03; 1805-06; 1819; 1815; 2064-67; 2100; 2104.

Lay-witness testimony offered by the plaintiffs was not nearly as reliable. First, only one of the plaintiffs' witnesses who attempted to identify the Indian-preferred candidates in Martin city elections actually lived in the City of Martin. The four other witnesses called by plaintiffs were Indian activists living on reservation land. Trial Tr. 540:2-6; 547:15-17; 849:13-18; 880:19-25; 898:2-5; 1518:7-12. Plaintiffs' witnesses were solely Indian, fewer in number, did not live in the city, and were not eligible to vote in city elections. Trial Tr. 523-524; 540; 547-548; 849; 880; 898 and 1488.

There was a marked difference between the testimony of Native American people who lived and voted in the city as opposed to Native Americans who lived in Indian country. The lay testimony demonstrated a division between Indian members of the LaCreek Civil Rights Group and Indian people who lived in Martin. Trial Tr. 1620; 1634-35; 1694; 1802-03; 1805-06; 1808; 1819; 1828-31; 1834; 1994; 2054-2059; 2062-2066; 2097-2109. Evidence indicated that the LaCreek Civil Rights Group met on Indian trust land and was comprised of nearly all Indian people living in Indian country. Indian defense witnesses testified that they found the LaCreek Civil Rights Group's positions offensive to their own values. Trial Tr. 1802; 2063-2066. Defendants' Indian lay testimony demonstrated that Indians in Martin have varied political opinions and varied candidate preferences for elected office, negating white bloc voting. Trial Tr.

1403-1404; 1580-1581; 1618; 1693; 1801-1803; 2064-2067; 2104.

Second, the plaintiffs' lay testimony regarding who was considered to be truly "Indian" rendered their opinion as to the Indian-preferred candidate inherently suspect. Lead plaintiff, Pearl Cottier testified that some Indians become too "acculturated" and are not considered "Indian" by other Indians. Trial Tr. 249-250; 253-254; 258-259 and 269-270. Therefore, her testimony regarding the "Indian vote" excluded such "acculturated" Indians. *Id.* Plaintiffs' citations to Pearl Cottier's testimony about who Indians voted for is fraught with problems, as her definition of who is Indian differs from those who self-identify as Indian on census forms.

The district court found that the lay testimony did not show that Indian-preferred candidates lost because of white bloc voting. As the en banc court recognized, "[t]his is a factual finding that addresses the relative persuasiveness of disputed lay testimony and statistical evidence unfavorable to the plaintiffs." *Cottier II* at 561; Pet. App. 172a. It was reasonable for the lower courts to give more weight to testimony of Indian and white witnesses who did live and vote in the City of Martin over testimony of Indians living outside the city on reservation land.

In addition to disputed lay testimony, the district court and en banc court also thoroughly considered the non-statistical evidence of a 2003 exit poll.

Dr. Cole conducted an exit poll in Martin on June 3, 2003. Pet. App. 32a. Dr. Cole elicited a response rate of only 38.5% of the city voters who voted that day. Pet. App. 32a. Dr. Cole's response rate among Native Americans was 78.2%. Pet. App. 33a. His response rate among white voters was 20.9%. Pet. App. 33a. Dr. Cole significantly underrepresented white voters in his exit poll, and therefore the exit poll results are suspect. Pet. App. 43a.

One method to determine the accuracy of an exit poll is to ascertain whether the exit poll predicted the correct winner in each race. *Hall v. Holder*, 757 F. Supp. 1560, 1577 (M.D. Ga. 1991). In Ward Three, Dr. Cole's exit poll predicted that Doug Justus was the winner, when in fact Todd Alexander won the seat. Dr. Cole's exit poll report also concluded that the *loser* of the race, Doug Justus, was the preferred candidate by both Native American voters *and* white voters, further throwing suspicion over the validity and accuracy of the exit poll results. Pet. App. 44a. In addition, Dr. Cole's exit poll was not conducted properly so to eliminate biased results. Trial Tr. 286-287; 794-795; 802-803; 1065-1069.

The district court found serious shortcomings in the methodology used by plaintiffs' expert in conducting the exit poll. Pet. App. 42a-44a. The en banc court found that it was not clear error for the district court to consider the exit poll findings and ultimately determine its data was unreliable. Pet. App. 166a-168a.

In no instance did the en banc court hold that statistical evidence was required or categorically reject plaintiffs' non-statistical evidence. Rather, both the district court and en banc court reviewed and discussed plaintiffs' proffered statistical evidence, lay-witness testimony, and 2003 exit poll data. Pet. App. 164a-173a, 52a-76a. After weighing the reliability and persuasiveness of the contested data and testimony, the district court found the plaintiffs failed to prove their burden under the third *Gingles* prong. The en banc court found no clear error in the district court's weighing of the "relative persuasiveness of disputed lay testimony and disputed statistical evidence unfavorable to the plaintiffs." Pet. App. 173a. Far from "rejecting" plaintiffs' non-statistical evidence, the district court and en banc court considered the evidence, but found plaintiffs' statistical evidence more reliable and compelling than the heavily-disputed lay-witness testimony.

Petitioners assert that the en banc court held that statistical evidence is required to prove the third *Gingles* precondition, and that the en banc court rejected the non-statistical evidence, creating a circuit split. This court could only find a circuit split if in fact the petitioners' assertion is true – that the en banc court rejected non-statistical evidence. To the contrary, the en banc court, as well as the district court, considered and reviewed lay-witness testimony as well as exit poll data and other non-statistical evidence. Accordingly, there is no circuit split created by the en banc decision.

Petitioners assert that a circuit split is created by the en banc court's "holding that a district court need not even make findings identifying the minority-preferred candidates in the absence of statistical evidence." Pet. 27. There was no "absence of statistical evidence" for Martin city residents' voting behavior. To the extent that plaintiffs argue their lack of statistical evidence for city council elections, this argument misses the point. The district court and en banc court found that the non-statistical evidence shows that there was no discernable Indian-preferred candidate for city elections. *Cottier II* at 561; Pet. App. 172a. The lay testimony disputed whether Indians in Martin preferred particular candidates.

IV. The En Banc Court's Analysis of Non-municipal Elections Is Not in Conflict With Other Cases, and Petitioners Vigorously Persuaded the District Court to Determine City Voting Behavior Based on Non-municipal Election Results.

First, plaintiffs allege it error for the en banc court to count Indian-preferred candidate victories in county-wide elections. In other words, the plaintiffs argue that the court erred when it used countywide vote totals to reach conclusions regarding voting behavior in the city. Appellants' Brief 50-54. It is astounding that plaintiffs now take this position, because at trial plaintiffs took the opposite position

inviting the court to determine city voting behavior based on non-city election results.

Both sides' experts agreed that traditional statistical analysis of city council election results could not be completed because there are only three precincts within the City of Martin, and none of the precincts are largely all Indian or all white. Pet. App. 57a-75a. The plaintiffs introduced evidence prepared by their expert witness, Dr. Cole. Dr. Cole claimed to be able to statistically project *city* voting behavior based on the voting behavior of all residents in Bennett County. Appellants' Sep. App. 531-53[illegible]. Permeating Dr. Cole's report are repeated statements attempting to bolster the strength of his opinions by finding that his opinions about the voting patterns in the city are consistent with voting patterns within the county. *Id.* at 535-536, 538 ("[T]he three city precincts usually fell very close to the regression line indicating that there is evidence for polarization *in the city* as well as in the county." (emphasis added)).

Furthermore, in head-to-head contests, Dr. Cole claimed to be able to estimate voting behavior in the City of Martin based on aggregate data from exogenous races. Appellants' Sep. App. 531-532. Dr. Cole analyzed twenty-eight exogenous elections, and by performing EI, claimed to generate estimates of voting behavior in the City of Martin. *Id.* at 545, 573-577. Thus, plaintiffs introduced expert evidence attempting to convince the district court that voting behavior within the City of Martin could be statistically

estimated based on election results from election contests outside the City of Martin.

Plaintiffs also fought for acceptance of their county-wide election data in briefing. Doc. Entry # 360 ¶ 243-246. In fact, plaintiffs argued that the district court should find the county-wide races more probative than non-local elections. Doc. Entry # 360, ¶ 246. Plaintiffs now claim the court erred when it found county races the most probative.[2] Plaintiffs may not claim reversible error when the error is by their own invitation. See *Arkansas State Highway Commission v. Arkansas River Co.*, 271 F.3d 753, 760 (8th Cir. 2001); *Dillon v. Nissan Motor Co.*, 968 F.2d 263, 269 (8th Cir. 1993). Nor is it error to consider the most "local" of races with statistics available. See, e.g., *Sanchez v. Colorado*, 97 F.3d 1303, 1317 (10th Cir. 1996) (considering exogenous elections); *Westwego Citizens for Beiter Government v. City of Westwego*, 872 F.2d 1201, 1209 (5th Cir. 1989) (same); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987) (exogenous elections are probative "because they reflect local voting patterns"); *Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 29 F. Supp. 2d 448, 455 (W.D. Tenn. 1998) (considering exogenous elections), aff'd 209 F.3d 835 (6th Cir. 2000); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 760 (N.D. Ga. 1997)

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[2] Plaintiffs did not submit statistical data for city elections. County elections were the most "local" of all statistical data presented.

(exogenous elections are relevant to the extent that they allow an inference of voting behavior). *Gingles*, 478 U.S. at 57 n.25 (in the absence of ideal data, "courts must rely on other factors that tend to prove unequal access to the electoral process"); see also *Id.* at 45 (requiring a "searching practical evaluation") *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) ("*Gingles* . . . suggests flexibility in the face of sparse data.").

Plaintiffs claim that "county results showed Indian-preferred candidates winning the county only 7 out of 15 (47%) times." Plaintiffs fail to point out that 2 of the 15 races had no discernable Indian-preferred candidate. By definition, a contest with no Indian-preferred candidate is not polarized, and cannot be counted as an Indian-preferred candidate defeat. Using far more accurate and appropriate figures, county results showed 7 Indian-preferred candidate wins, 2 non-polarized contests, and 6 Indian-preferred candidate losses. Six losses out of 15 total contests is a 40% Indian-preferred candidate loss rate. Using appropriate numbers, one cannot possibly contend that the Indian-preferred candidate losing 40% of the time satisfies the third *Gingles* prong, which requires that the minority-preferred candidates *usually* lose due to white-bloc voting.

Plaintiffs next state that "election returns on file with the court showed the same Indian-preferred candidates winning the city only 1 out of 15 times (7%)." Plaintiffs' Brief p. 30. Plaintiffs are describing three documents that they disclosed for the first time

on appeal, attaching them to their addendum to their appeal brief filed with the Eighth Circuit twelve months after trial. Plaintiffs asked the court to judicially notice the three documents to buttress their claim that they met the third *Gingles* prong. These documents only provide information regarding 8 contests, not 15 as plaintiffs claim. The en banc court rejected plaintiffs' suggestions that it should take judicial notice of additional election data when disclosed for the first time on appeal. The en banc court stated that "[a]side from whether the documents are properly authenticated, we decline through judicial notice to allow one party to augment its evidentiary presentation in a case involving extensive statistics that were the subject of complex analysis by experts for both parties." Pet. App. 171a. n.4. In like token, this Court should not grant writ of certiorari based on an argument submitted though documents which escaped both sides' experts' statistical analysis and consideration by the trial court.

The nexus of plaintiffs' argument is that the lower courts should not have used county election data, since the plaintiffs allege that "Indians constitute a sizable majority of the population" of the county. Plaintiffs' Brief p. 27. Plaintiffs later concede that Bennett County is only 50% Indian voting-age population. Voting age population is the proper data used when calculating voter behavior, since only those of voting age may in fact vote. *Johnson v. Miller*, 922 F. Supp. 1556, 1568 nn.18 & 19 (S.D. Ga. 1995) (noting that minority voting age population is

the appropriate measure for analyzing vote dilution), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997). Plaintiffs' citations to case law discussing majority-minority districts are irrelevant, as Bennett County is not majority-Indian in its voting age population.

Next, plaintiffs allege that the lower courts gave the same probative value to elections in which the Indian-preferred candidate was white as it did to elections in which the Indian-preferred candidate was Indian. The record is quite clearly to the contrary.

The trial court found that interracial elections are more probative than racially homogenous ones. Pet. App. 26a, 55a, 56a, 57a. The trial court found endogenous elections are more probative than exogenous elections, and recent elections are more probative than elections in the distant past. Pet. App. 26a, 55a, 56a. The trial court also found the exogenous elections for offices with comparable levels of importance within the community are entitled to more weight than dissimilar contests. Pet. App. 26a, 56a, 57a. The trial court stated that "[h]ere, the court will give more weight to local county-wide elections than state legislative, statewide or federal elections." Pet. App. 26a, 56a, 57a. The trial court also recognized that while interracial elections are highly probative of minority voting patterns, minority-preferred candidates may not always be a minority. Pet. App. 27a. citing *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 605-06 (4th Cir. 1996). Therefore, the court did not

limit its consideration to interracial elections. Pet. App. 27a.

The trial court set forth charts of voting statistics in the order of the weight given by the court.[3] Pet. App. 57a. The trial court clearly gave the most probative value to interracial county-wide races, which indicated 8 Indian-preferred candidate wins, 5 Indian-preferred candidate losses, and 1 race had no discernable Indian-preferred candidate. Pet. App. 61a. The court found the second most probative set of data to be interracial, state office elections, in which the Indian-preferred candidate lost 3 out of 3 races. Pet. App. 62a. The next most probative data set was white candidates in county-wide exogenous elections, of which 1 Indian-preferred candidate won,

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[3] The Court should note that petitioners inaccurately describe the trial and en banc courts' findings in their Table 4. Pet. 15. An accurate table of the en banc court's findings is as follows:

Election Type	W	L	Non-Polarized
Interracial, head-to-head, countywide offices	0	3	1
Interracial, head-to-head, statewide offices	0	3	
White only, state and federal offices	15	10	
White only, countywide offices	1	1	1
Total	16	17	2

The Indian-preferred candidate loss rate for Table 4 is 49%. Adding the Table 4 data to Petitioners' Table 5 data, the total Indian-preferred candidate loss rate is 50%.

1 Indian-preferred candidate lost, and 1 contest had no Indian-preferred candidate. Pet. App. 64a. Fourth in line for probative value, the court analyzed contest between white candidates for state and federal office. Pet. App. 65a. Of this data set, the Court found that Indian-preferred candidates won 17 contests and lost 14 contests. Pet. App. 75a. These numbers certainly support the trial court's finding that white voters did not vote sufficiently as a bloc to usually defeat the Indian-preferred candidate. Pet. App. 61a.

Nor did the en banc court simply group all election results together, giving equal weight to all contests. Rather, the en banc court recognized that the trial court "divided these exogenous elections into several categories and made findings with respect to each." Pet. App. 164a-165a. The en banc court acknowledged that the trial court gave interracial contests more weight, and county-wide elections should receive greater weight than state and federal elections. Pet. App. 165a. The en banc court found the trial court's weighing of the evidence was not clearly in error, citing Justice O'Connor's concurrence in *Gingles* that even where a district court clearly erred by aggregating certain data to find racial bloc voting, a district court's ultimate conclusion is not clearly erroneous in light of other evidence that the court also considered. Pet. App. 172a.

Plaintiffs' complaint of the court's use of county election data is that it was given "the same probative value as victories at the city level." Plaintiffs' Brief p. 33. Again, there were no city election statistical analysis

completed or offered to the court. Plaintiffs are solely relying on their non-statistical evidence for this argument. Plaintiffs' reference to 6 out of 6 Indian-preferred candidates being defeated in city elections is a reference to the lay-witness testimony, for which no statistical analysis could be done. Plaintiffs' Brief p. 33. This lay-witness testimony was seriously disputed, as discussed above. Apparently, Plaintiffs' argument solely rests on the assertion that their five lay witnesses, 4 of which did not live or vote in the City of Martin, whose testimony was disputed by many Indian city residents and city voters, should have been given more probative value than the objective statistical analysis proffered by plaintiffs themselves, showing the Indian-preferred candidate did not usually lose. Such an argument provides no legal issue, but rather a plea for this Court to re-evaluate the persuasiveness and credibility of lay witnesses.

Plaintiffs state that white voters in Martin defeated 12 out of 29 (41%) Indian-preferred candidates when Indian voters preferred a white candidate. Plaintiffs' Brief p. 33. Plaintiffs do not cite the record and one cannot ascertain where these numbers originate. It does not appear that petitioners have raised these facts before, and they do not appear to be supported by the record. This Court should not consider new facts, unsupported by the record, in considering petitioners' petition.

Petitioners strongly urged the district court to consider their exogenous election data, and in the exact order of probative value as the district court

ultimately adopted. Petitioners should not be granted writ of certiorari on an alleged error that they invited. As indicated above, the court's analysis of such data was not legal error, and it was certainly within the court's discretion to weigh the credibility and persuasiveness of the lay-witness testimony.

V. This Case Does Not Raise Issues of Exceptional National Importance as Asserted by Petitioners.

Again, plaintiffs wrongfully allege that because there was an "absence" of statistical evidence, the district court was able to disregard "stark racial polarization in municipal elections." As indicated above, plaintiffs themselves supplied a great deal of statistical evidence, urged the court to accept it, and now claim error because the court did as they urged. The statistical evidence was unfavorable to the plaintiffs. Now petitioners ask this Court to find error in accepting plaintiffs' statistical evidence, and instead hold that seriously disputed lay-witness testimony satisfies the third *Gingles* prong, despite the lower courts' finding of credibility and persuasiveness of the lay-witness testimony. Asking this Court to find "stark racial polarization" from such disputed lay-witness testimony does not warrant a writ of certiorari from this Court.

Petitioners' attempt to appeal to this Court by purporting that small towns across this country will avoid liability if this Court does not assign guidance

on the probative value of specific elections. Of course, what petitioners are asking for here is that all of their own statistical evidence be found irrelevant in comparison to the few witnesses plaintiffs had take the stand and opine about who they thought people who actually lived in Martin voted for. There is no urgent need for this Court to assign guidance as to how trial courts should weigh mixed lay testimony against mixed statistical evidence, when neither prove polarization. Nothing about the weighing of such factual evidence will lead to different standards used in different circuits, as the plaintiffs assert. Petitioners simply did not meet their burden.

VI. Contrary to the Petitioners' Assertion, the Evidence of Racial Polarization in this Case Is Not "Overwhelming" and the Case Is Poorly Suited to Determine Anything Other Than the Credibility of the Lay Witnesses.

Again, racial polarization was not overwhelming according to the statistical evidence, and the lay-witness testimony was mixed. Unlike as represented by plaintiffs, there would be no way to determine whether plaintiffs' lay-witness testimony substantiated polarized voting without also reviewing the numerous defense witnesses testifying to the contrary. This case certainly does not allow this Court "to address the important underlying legal questions with a minimum of factual complexity" as plaintiffs contend.

There is simply no set of facts to justify plaintiffs' statement that "Indian voters had absolutely no success in electing their preferred candidates except when those candidates were white." Plaintiffs' Brief, p. 38. Evidence indicated numerous Indian candidates winning contests over several years. An election in the city included an Indian versus Indian contest, with no white contenders. Pet. App. 34a. "The absence of white challengers to black incumbent[s] . . . is indicative of the lack of legally significant racial bloc voting." *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997); *affm'd* 173 F.3d 377 (6th Cir. 1999). From 1981 until trial, the City of Martin elected 12 Indian candidates to city council out of 81 candidacies. Pet. App. 36a. Exhibit 448, p. 26-37. Other elections included Indian candidates running unopposed. Of contested and uncontested races, Native Americans have won 7 times and lost 5 times. Exhibit 448, p. 26-27. Weber p. 1054. Plaintiffs' own expert report indicates numerous Indian-preferred Indian candidates took office.

CONCLUSION

This case turned on the credibility and persuasiveness of lay-witness testimony and statistical evidence, carefully weighed by the district and en banc courts. Petitioners are dissatisfied with the result, but the result hinged upon the persuasiveness of the evidence, not legal error. This case does not call out for this Court's review as no circuit splits were created by the en banc court's holding, and no other issue warrants Supreme Court review.

In addition, petitioners' appeal is moot, and nothing would be gained by granting writ of certiorari only to prompt further litigation of a moot issue.

The Supreme Court should deny writ of certiorari.

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No. 10-335

IN THE

Supreme Court of the United States

PEARL COTTIER,
REBECCA THREE STARS,

Petitioners,

—v.—

CITY OF MARTIN; et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

This case reads like a tale of two cities. The district court described a city whose Indian community is well organized, politically cohesive, and deeply engaged in federal, state, county, school board, and municipal elections. (App. 44a-50a.) The respondents, on the other hand, claim that Martin's Indian voters expressed no discernible preferences in seven straight aldermanic elections. (Br. 24.) The respondents describe a very different Martin because they want this Court to believe that the district court simply chose their version of the facts over ours, making this a fact-bound case unworthy of further review.

The reality, however, is that the district court rejected the respondents' version of the facts. It rejected their claim that Indian voters had no discernable preferences in city elections (App. 49a-50a), and it later rejected the testimony upon which the respondents rely (App. 130a). The outcome of this case turns not on a choice of facts but on the answers to three important questions of law that will affect whether and how Section 2 of the Voting Rights Act applies in small cities like Martin.

These questions need answers now. There is no doubt that the absence of statistical evidence from aldermanic elections makes this case more complicated than some, but that's also what makes it so important. There are likely hundreds of small jurisdictions like Martin in Indian Country and across the nation where statistical analysis of racially polarized voting is impossible

because of the small number of precincts. Many of them are soon to redistrict. They need to know whether the impossibility of statistical analysis frees them to draw plans like Ordinance 122, which fragments Martin's Indian population with almost surgical precision, and effectively shields them from liability for vote dilution under Section 2.

I. THIS CASE IS NOT MOOT

The petitioners contend that this appeal is moot because the city will hold no more elections under Ordinance 122 after June of next year. They claim that the city will redistrict following the release of the decennial census next year and that vote dilution under Ordinance 122 is therefore incapable of repetition.

In fact, there is no reason to think that the city will redistrict following the release of the 2010 Census, and the record suggests that it won't. State law does not require the city to redistrict, and this Court's one-person-one-vote cases would only require the city to redistrict in the unlikely event that substantial and uneven population changes cause Ordinance 122 to become malapportioned. Those changes are unlikely because Martin's population has been remarkably stable. Between 1990 and 2000, the city's population decreased by only 24 people. (Trial Ex. 180 at 11.) Martin has not changed its boundaries since the last census, and there is no evidence of a significant increase or decrease in population—much less a change that is concentrated in any particular ward. Before

Ordinance 122, the city had not redistricted in decades (Trial Tr. vol. 10, 2169:7-19, July 1, 2004), and it could well be decades before Martin redistricts again.

As a legal matter, moreover, the respondents' argument is beside the point. The petitioners' complaint here is not simply about vote dilution under Ordinance 122. It is about vote dilution by the fragmentation of Martin's Indian population among the city's three wards. That is the "alleged illegality" that is capable of repetition, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), and that's why the remedy in this case would be not only to enjoin the city from enforcing Ordinance 122 but also to require the city to hold future elections under a nondilutive plan. Unless and until the city holds elections under a nondilutive plan, the petitioners will continue to suffer the injury described in their complaint.

This continuing injury is not merely speculative. If the city were to redistrict after next year's elections, its new plan would likely be based on Ordinance 122. Indeed, the author of Ordinance 122 testified that his goal in drawing that plan was to make "minimal changes" to the preexisting plan in order to "keep it simple" and avoid voter confusion. (Trial Tr. vol. 7, 1370:1-3, June 28, 2004.) Minimal changes, however, would not be enough to fix the severe fragmentation apparent in Ordinance 122. It is therefore not only possible but likely that the petitioners would again face a plan that gives non-Indian voters an overwhelming

supermajority in all three wards if the city were to redistrict in the future as it has in the past. That likelihood, rather than the likelihood of further elections held under Ordinance 122, is what preserves the issue of vote dilution for review by this Court as "capable of repetition but evading review." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 895 (2010).

Finally, prudential considerations also favor hearing the case now despite the possibility of future redistricting. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 288-89 (2000) (the Court's interest in preventing litigants from attempting to manipulate its jurisdiction in order to insulate a favorable decision from review weighs against a finding of mootness). Voting cases can take a long time. *See, e.g., Easley v. Cromartie*, 532 U.S. 234 (2000). The petitioners brought this case in early 2002, and they have prosecuted it diligently throughout its lifespan. Denying certiorari now because of the possibility that the city might redistrict next year would give jurisdictions every incentive to run out the clock on voting claims in the future, and it would virtually foreclose all but the speediest possible challenges to redistricting plans enacted after the middle of a decade.

Mootness should therefore be no impediment to a grant of certiorari. This case continues to present real, live, and important questions about the proper application of the Voting Rights Act, and this Court should answer them now.

II. RESPONDENTS HAVE NO ANSWER TO THE JURISDICTIONAL QUESTION

The respondents contend that there is no jurisdictional question. They argue, specifically, that the district court's original finding was a final decision reviewable in the court of appeals under 28 U.S.C. § 1291 even if that decision did not merge into the final judgment from which they appealed after remand. They argue, in other words, that the merger rule is irrelevant.

That cannot possibly be the case. Just last term, this Court made clear that final decisions are not reviewable forever. In *Salazar v. Buono*, 130 S. Ct. 1803, 1814 (2010), the Government challenged Buono's standing to bring an Establishment Clause claim after that claim had been fully adjudicated and Buono was seeking to enforce the court-ordered injunction. The Court held, however, that the district court's original decision on standing became final and unreviewable upon the expiration of the 90-day period for filing a petition for certiorari from the initial Establishment Clause ruling. The Government could not seek review of the district court's clearly final decision upon appeal from a subsequent order enforcing the original judgment. The respondents' argument that final decisions are perpetually reviewable is thus inconsistent with *Salazar's* holding that some final decisions really do become final.

Here, the district court's original findings were embodied in its 2005 judgment. As in *Salazar*, the parties' opportunity to seek review of that judgment ended when neither party filed a

petition for a writ of certiorari following the Eighth Circuit's denial of rehearing en banc. On remand, the respondents appealed the district court's 2007 judgment. (Not. Appeal, Mar. 6, 2007.) As in *Salazar*, the court of appeals had no jurisdiction in the subsequent appeal to decide issues that were embodied in the 2005 judgment but not in the 2007 judgment. So how, then, could the Eighth Circuit have had jurisdiction to review the district court's original finding, embodied in the 2005 judgment, on appeal from the 2007 judgment?

The respondents have no answer to this question. They seem to concede that the district court's original finding on the third *Gingles* factor, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), did not merge into the 2007 judgment, and they offer no explanation beyond their argument for perpetual reviewability. The Eighth Circuit's jurisdiction to review a finding embodied only in the 2005 judgment on appeal from the 2007 judgment thus seems doubtful at best. The jurisdictional issue remains a serious question that this Court should either resolve, ask the Eighth Circuit to resolve in the first instance, or hold pending clarification of the merger rule in *Ortiz v. Jordan*, 316 Fed. Appx. 449 (6th Cir. 2009), *cert. granted*, 130 S.Ct. 2371 (Apr. 26, 2010) (No. 09-737).

III. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER NON-STATISTICAL EVIDENCE IS "SUFFICIENT" TO ESTABLISH RACIALLY POLARIZED VOTING.

On the merits, the respondents claim that the courts below did not reject the petitioners' nonstatistical evidence but just couldn't identify the Indian-preferred candidates because of a disputed record. This claim is simply impossible to reconcile with the district court's opinion or with the record itself.

A. Nowhere in its opinion does the district court express any difficulty in discerning the Indian-preferred candidates in Martin's municipal elections. To the contrary, the district court found that the plaintiffs could not establish the third *Gingles* precondition *despite* its ability to identify the Indian-preferred candidates in municipal elections and their consistent defeat.

The district court clearly considered the 2003 exit poll. (App. 55a-56a.) It found that the poll identified the two Indian-preferred candidates, Gotheridge and Justus, and it found "that the Indian-preferred candidates lost." (App. 56a.) But it rejected the poll as "not sufficient proof of polarization" under the third *Gingles* precondition because white voters were underrepresented in the sample. (App. 56a, 43a.) The court rejected the evidence not because of any inability to discern the Indian-preferred candidates or their consistent defeat but because of its ruling that the third *Gingles* precondition required the plaintiffs to make an additional

showing of white bloc voting—something that it mistakenly believed the poll could not do.

The district court then rejected lay witness testimony for essentially the same reason. It noted that the petitioners had presented testimony identifying the Indian-preferred candidates in aldermanic elections, and it noted that those candidates lost consistently. (App. 76a.) The court also noted the petitioners' contention that white bloc voting was the only possible explanation for the defeat of Indian-preferred candidates in a city with no other racial or ethnic groups. But the court disagreed, concluding that the lay testimony was "not sufficient to meet the plaintiffs' burden" because it did not eliminate explanations for the defeat of Indian-preferred candidates other than white bloc voting, such as "campaign efforts, platform popularity, or candidate characteristics." (App. 76a.) And because lay testimony was insufficient to meet the plaintiffs' burden, the district court made no findings whatsoever about the Indian-preferred candidates in the 2002 and 2004 municipal elections.

These rulings squarely raise the question of what showing is necessary to prove the third *Gingles* precondition. Can a plaintiff meet its burden with nonstatistical evidence identifying the minority-preferred candidates and showing that they were defeated? Or must a plaintiff show something more?

The panel decision in *Cottier I* correctly recognized that, as a mathematical proposition, white bloc voting is the only explanation for the

defeat of candidates preferred by the majority of Martin's Indian voters, and that, as a result, the district court was wrong to conclude that the plaintiffs had not met their burden. (App. 94a.) The en banc court reversed in *Cottier II*, agreeing with the district court's ruling that the third *Gingles* precondition requires a showing of white bloc voting that nonstatistical evidence about the defeat of minority-preferred candidates does not provide. (App. 172a.)

Every other court to have considered this issue, including this Court in *Gingles*, has come down on the side of *Cottier I*. This Court should therefore grant the writ of certiorari to resolve the conflict and clarify *Gingles*.

B. The record also fails to support the respondents' suggestion that there is a factual dispute over the identity of the Indian-preferred candidates in municipal elections.

Our petition lists all of the candidates in the seven aldermanic elections between 2002 and 2004 and identifies the Indian-preferred candidates in each. (Pet. 6.) That list is supported by the testimony of five lay witnesses, all of whom are tribal members and have lived in the Martin area for virtually all of their lives,[1]

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[1] The respondents contend that the plaintiffs' lay witnesses were not as reliable as theirs because only one of them "actually lived in the City of Martin" and the others were "Indian activists living on reservation land" outside of the city. (Br. 20.) This is a red herring at best. One of the lay witnesses was Martin-resident and plaintiff Pearl Cottier, who first moved to the city when she was thirteen years old and who had lived and voted there for most of her then

and it is corroborated by campaign materials prepared and distributed by Indian activists within the city.

The respondents have produced no alternative list. They do not claim, for example, that Rodney Anderson was the Indian-preferred candidate in the 2002 election for Ward I against Rebecca Three Stars. There is not a scintilla of evidence in the trial record indicating that Anderson was the Indian-preferred candidate, and any finding that he was would be clearly erroneous because it lacked support in the record. There is likewise not a scintilla of evidence that Three Stars was *not* the Indian-preferred candidate and any finding that she was not would also lack support in the record. Despite ample opportunity at trial, in numerous post-trial and appellate briefs, and in their brief before this Court, the respondents have never identified

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seventy-three years. The other lay witnesses were: Alice Two Bulls Young, a Lakota elder who had lived in or around Martin since 1958 and lived at the time in tribal housing on Indian trust land located less than two miles outside of the city limits; Gerald Bettelyoun, who worked in the City of Martin for twenty-seven years and had spent his entire life living near Martin; Charlie Cummings, who was born and raised in Martin, who had spent all but a year of his life in the area, and who also lived at the time less than two miles east of the city limits; and Craig Dillon, who had lived in the Martin area since grade school and lived at the time in tribal housing one mile north of Martin. The district court expressly found Dillon's testimony to be "reliable," "credible," and worthy of "great weight" in its analysis of Indian political cohesiveness in Martin (App. 49a), and it found the witnesses upon which the respondents rely to be "incredible" (App. 130a).

anyone as an Indian-preferred candidate in the 2002, 2003, or 2004 municipal elections. That does not make for a genuine factual dispute over the identity of Indian-preferred candidates.

There is no doubt that Native Americans in Martin are not monolithic in their political views. The respondents have made that argument repeatedly. But the district court correctly rejected their argument that the absence of a monolith means that Indian voters in Martin lack identifiable issues, interests, and candidates of choice. (App. 49-50a.)

Even if there were a genuine dispute over the identity of the Indian-preferred candidates, moreover, the district court should have resolved it. The identity of those candidates, plus the fact of their defeat at the hands of non-Indian voters, should have been sufficient for the plaintiffs to meet their burden under the third *Gingles* precondition.

IV. THE EIGHTH CIRCUIT'S ANALYSIS OF NONMUNICIPAL ELECTIONS SQUARELY PRESENTS TWO IMPORTANT CONFLICTS OF LAW.

The respondents offer only a tepid defense of the en banc court's analysis of nonmunicipal elections.

First, they contend that *Johnson v. De Grandy*, 512 U.S. 997 (1994), is "irrelevant" because, although Indian's make up a substantial majority of Bennett County's total population, the voting-age population of the county is evenly split. (Br. 28-29.) But they don't claim that white voters are a majority in the county, nor do they otherwise explain why it was appropriate for the courts below to infer equal opportunity in Martin, where Native Americans constitute only 36% of the voting population, from success for Indian-preferred candidates at the county level, where Native Americans constitute 50% of the voting-age population.

Second, the respondents claim that both the district court and the en banc court below gave interracial elections more probative value than elections with only white candidates, but that claim doesn't square with their own tallies showing no success for Indian-preferred candidates in interracial elections. (Br. 30.)

More importantly, the respondents don't dispute the troubling fact that Indian voters have had no success in electing their preferred candidates except in nonmunicipal elections,

when those candidates are white,[2] or when the courts gauged success or failure based on county election results.[3] And they don't even attempt to reconcile this lack of success with the Voting Rights Act's guarantee of equal electoral opportunity.

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[2] The respondents ask where in the record we find evidence of the race of Indian-preferred candidates. (Br. 32.) Among other places, the race of candidates is listed in the report of the respondents' own expert statistician. (Trial Exs. 449, 450.)

[3] The respondents confuse county *results* with county *data*. Both parties' experts used county *data* to determine the identity of the candidates preferred by Indian voters in the city's three precincts. The error of the courts below was in using county *results* to tally the success or failure of those candidate. Those courts tallied a success even if the candidate preferred by Martin's Indian voters lost in the city.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the Court should grant certiorari to review the judgment of the Eighth Circuit.

In the alternative, the Court should grant, vacate, and remand the case to the Eighth Circuit to allow it to consider the jurisdictional question in the first instance, or it should hold the petition pending the Court's resolution of *Ortiz v. Jordan*, 09-737.

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